Bar News

The journal of the NSW Bar Association

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1995

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Barristers wishing to join the Editorial Committee are invited to write to the Editor indicating the areas in which they would be interested in assisting.

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in this issue ...

Bar Notes

1995 Senior Counsel

On 2 November 1995 the President, Murray Tobias QC, announced the appointment of the following persons as Senior Counsel, effective 3 November 1995:

1. Timothy Roscoe HOYLE
2. Michael James CRANITCH
3. David Garnet Thomas NOCK
4. Clifton Ralph Russell HOEBEN
5. David John HIGGS
6. Ian Gordon HARRISON
7. John Vincent AGIUS
8. Paul BYRNE
9. Leslie Sydney KATZ
10. Helen Gay MURRELL
11. Stephen Craig ROTHMAN
12. Michael Andrew PEMBROKE
13. Anthony John MEAGHER
14. Alan ROBERTSON
15. Robert KELEMAN
16. Richard Francis EDMONDS

Rule 21 and Service of Medical Reports in Common Law Cases

Rule 21 of the New South Wales Barristers' Rules reads:-

> *"A Barrister must not knowingly make a misleading statement to a court on any matter."*

The tender of a medical report in common law proceedings where counsel making the tender is aware that in a subsequent report the doctor has changed his opinion constitutes making a misleading statement to a court.

If a situation arises where counsel has tendered the report of a medical practitioner and then subsequent to that tender becomes aware from a later report that the medical practitioner has changed his or her views counsel should, in order to comply with rule 21, either tender the second report or, alternatively, withdraw the tender of the first report.

There is, of course, no ethical obligation on counsel to adduce evidence unfavourable to a client's case. That is not the situation here. Where a personal injuries case is to be decided on reports, the tender of a report in the circumstances outlined above constitutes an assertion by counsel making the tender that the report contains the current opinion of that doctor when he knows that is not the case. ❑

Election of Members of the Bar Council for the Year 1996

The following were elected as members of the Council for the New South Wales Bar Association for the year 1996.

Inner Bar

Burbidge QC
Bennett QC
Barker QC
Hely QC
Adams QC
Poulos QC
Slattery QC
Walker SC
McColl SC

Outer Bar

Three members of less than five years standing

Gyles
Gleeson
Abadee

Members of any length of standing

McIlwaine
Katzmann
Maiden
Toner
Greenwood
Street
Traill
Loukas
Needham

Bar Council Executive

The following were elected as office holders on 30 November 1995:

President:	D M J Bennett QC
Senior Vice-President:	P G Hely QC
Junior Vice-President:	B W Walker SC
Honorary Treasurer:	R S McColl SC
Honorary Secretary:	R S Toner

From the President

It is hard not to have a sense of history (as well as of one's own inadequacies) when one sits in the boardroom as president for the first time under the disapproving gazes of one's 27 predecessors. The sense of history is exacerbated in my case by two factors - I am the first president to be born in the 1940s (sorry to reveal your secret, Murray) and probably the last president to have seen (if not met) all my predecessors in the flesh.

My predecessors lived in very different worlds. When I joined the Bar Council in 1976, there was only one Ethics Committee and it did almost nothing. The Bar Rules forbade habitual undercutting of fees. The two thirds rule was, while no longer mandatory, virtually universally honoured. No silk could appear without a junior. A silk could not walk to court in his robes (it was always "his" then) unless carrying something and, more importantly, it was a sign of gross impertinence for a junior to walk anywhere in robes not carrying something. Issues such as "competition policy", "gender equality" and whether the Governor should continue to appoint silk on the advice of the Attorney-General were unheard of.

So much for egotistical self-indulgence and irrelevant nostalgia. We face in 1995 quite different issues.

I consider that the major challenge facing the Bar today is the need to maintain unity. We face a number of challenges to our manner of practice as independent practitioners and we can no longer take for granted that those challenges will all be rejected. Our cause was considerably advanced by our spectacular victory before the Legal Profession Advisory Council this year when it held that our rules were not only not anti-competitive, but actually pro-competitive. We have been saying this for years, but it was nice to have an outside body endorse it. We still face, however, the federal competition policy reforms.

Accident compensation is another area where we need to remain vigilant. There are many who would like to move to a full no-fault system or to a system from which lawyers are excluded. The danger of systems based on bureaucratic decision-making for injured workers do not need to be itemised. There is no-one but the legal profession to stand up for the injured against those who see short term political or financial advantage as more important than the protection of their rights.

In these, as in other areas, the Bar must be able to speak with one voice. When I hear the President of the Law Society say at swearing-in ceremonies that he speaks for 13,000 solicitors, I have often felt that our President should say that he speaks for 1800 presidents. It is of the nature of our calling that we are individualistic and that we do not march in step. What is important is that we appreciate that unity is our greatest strength. We cannot afford to let ourselves be divided by gender, by area of practice, by economic success or by location of chambers. Of course, these differences will produce different views and different perspectives but, so long as we remember that we are barristers first, they will not impede the achievement of results which virtually all of us wish to see.

I hope that my presidency will be a period in which the unity of the Bar is maintained. ❑ DMJ Bennett QC

Letters to the Editor

Leycester Meares Bequest

Dear Editor,

Would you be good enough to publish in the *Bar News* my personal thanks and those of the Honourable Ray Reynolds for the Bar's response to the appeal for CAPFA - and, in particular, for the Leycester Meares Bequest of which we are Trustees?

Some of your members may have received the Bar Association circular too late to contribute by 30 June - but be not affeared: if cheques drawn in favour of CAPFA are sent to Miss Kimberley Ashbee at the Bar Association office, even at this late stage - or later - they will be earmarked for the Bequest and will still qualify for a tax deduction.

HH Bell (Judge)

Re: This Sporting Life

Dear Editor,

I read with some interest and some wonderment John Maconachie's tale of the Bench & Bar v Services Golf Match in the Spring/Summer 1994 *Bar News*. Despite Maconachie's disclaimer, I am afraid he must have been all too successful in his search for more strong liquor after dinner, since his version of events was so different from the reality which I observed both on the course and at the dinner itself.

True, it is that "Gray shot the lights out", the golf enjoyable and the Army's hospitality wonderful, but thereafter facts gave way to fiction in Maconachie's telling especially so far as the dinner was concerned. Though it may make for a less sensational story, I can reassure your readers that the participation by all members of the Bar in both the golf and the evening events was appropriately civilised, even stylish and entirely "in keeping with the elegant surroundings".

DM Flaherty

It's in the Stars

Dear Editor,

I thought that the enclosed copy of the "Stars" may be of some interest to the readers of the Bar News. I was recently involved in a trial with Barber and Proctoer involving three accused.

The jury had been sent out by His Honour Judge Flannery after a two week trial. The jury were deliberating during the course of Friday morning when someone decided that a look at the "Stars" could save us the endless soul searching which comes with the jury deliberation. "Why did I ask that question?" "Why didn't I make that submission?" "Do you think that fellow down the front is really with us?" "What did that damn question they asked really mean?"

Easily solved, just read the answer in the "Stars". Strange, of course, when it was revealed that the two accused were Aquarians and both of their counsel (born on the same day) were Leos.

AQUARIUS
(Jan 21 to Feb 19)
"Something you hoped would not happen will occur - and you will just have to live with it. This is no time for you to be melodramatic, this is the time to cope with the crises."

But it got worse.

LEO
(July 24 to Aug 23)
"Something will come to an end - and it isn't just the working week. Unfortunately this thing won't end the way you and others with you, expected or wanted."

The mood was despondent, the clients morose, the solicitors apprehensive, the phone rang. "Sheriff here, we have a verdict"... The butterflies like pterodactyls in the stomach (why after 9 years is it that they refuse to go away?). "Not Guilty" - all accounts.... **** the Stars.

Glenn Whitehead

An Ode to Young Barristers

Live to attain
Not shrink like a violet
In perfumed and feigned pain.

Tall as eucalyptus
Stand
Above nihilists
In drifting sand.

When final judgment and no appeal
Reports and memories reveal
Not a passenger or a trailer
But a leader somewhat taller.

W SJ 1995

Hot Seat - Or Siberia?

The learned editor of this journal (obviously desperate for contributions) asked me some time ago if I would do a "First 100 Days" sort of article about being the Director of Public Prosecutions of the First/Premier/Waratah State. It was already too late. It is even later now.

I was left entirely alone to ask myself hopefully relevant questions and provide almost appropriate answers. At least that way I get to exercise a significant degree of editorial control.

So here is not "a frank and revealing interview with the State's top prosecutor in which he provides rare insights into topical issues and the operation of the criminal justice system".

Background

When my appointment was announced the *Sydney Morning Herald* did a Saturday Profile entitled "Man in the Hot Seat". It was positive and flattering and I was warmed. (It was a good thing I didn't ask the questions at that interview.)

I started in the position on 17 October 1994, 7 years after taking silk and 19 years to the day after hanging up my shingle in the old Frederick Jordan Chambers (after 4 1/2 years as a Public Defender in Papua New Guinea).

In the first 13 months I have found that the seat does occasionally warm up; but for a lot of the time I feel, as apparently did my predecessor Reg Blanch QC (now Chief Judge of the District Court) - or so he suggested at his 15-Bobber - that I have been exiled to a Siberia of the profession. I don't mind the heat, but the cold can be a worry.

Why Did I Take The Job?

It seemed like a good idea at the time. No, it didn't. By any rational criterion it was an exceedingly bad idea - a sudden and dramatic drop in income, loss of freedom and personal independence, public accountability, acquisition of administrative responsibilities and loss of my superb harbour view from Level 43, MLC Centre (which I still sorely miss).

Fate, probably. A logical progression of a career in, principally, criminal law with a lot of prosecuting and an interest through local and international associations in the broader questions in the operation of criminal justice systems.

Time for a change. We only get one crack at life and we might as well get some variety, challenge and hopefully satisfaction from it. And if we can do some good along the way, so much the better.

So when the headhunters came around they found a reasonably easy prey.

What Changes Did I Notice?

The air conditioning cooling tanks on the top of the Downing Centre are no substitute for Sydney Harbour (unless I redeploy my telescope to watch the breeding behaviour of legionella bacteria). But then, there is no time for window-gazing.

A principal difficulty is to remain a barrister while running an office of 500 staff (including about 240 solicitors and 70 Crown Prosecutors) in 11 offices throughout the State and coping with the challenges constantly thrown up by the government, the courts, the public and that ratbag on the radio (although that's not much of a challenge).

I have attempted to maintain practice by doing (so far) one trial and opposing a number of special leave applications in the High Court. I would like to do more, but the demands of the Office make it very difficult to run a second full-time job as Crown counsel.

The biggest mind change has been the realisation that even busy barristers do not work as hard or as long and under such constant pressure as people in positions like this. Barristers - even busy silk - have it easy by comparison because of the nature of private practice. They are briefed, do the work and return it with a bill. Clients of barristers seek and respond to advice and are represented for a finite time in court. The DPP by contrast is in fact a client, but one who directs his representatives and is responsible for their conduct and operations. He also has wider responsibilities to the community. For me, work does not come in easily digestible bites, no bills are sent (there is just a comparatively meagre automatic fortnightly reduction of the overdraft), jobs do not finish but stick around forever. The barrister's choice to say no has been removed and it is a luxury you don't appreciate until you lose it (even if you don't often exercise it).

But I am not whingeing. Next question?

What Do I Do On An Average Day?

Things are constantly happening to make days decidedly non-average, but that is probably a good feature of the job.

An average day is from 8am to 6.30pm with an extra couple of hours' work at home. Lunch is at the desk. Crazy.

There is a constant stream of matters across the desk from all over the State requiring decisions on no bill applications, ex officio indictments, the choice of charges, bail reviews, appeals against inadequate sentences, applications for stated cases, appeals from orders for costs

and so on. There are telephone and personal requests for instructions from prosecutors faced with unexpected (and sometimes expected) crises in court. There are representations from the public and politicians to be answered; speeches and papers to be written; Attorney General emergencies to deal with (notably public outcries over sentences and releases); matters of Office administration in and out of the office (which is a job by itself); liaison with other agencies in criminal justice; and so on.

The contribution of deputies, professional assistants and secretaries in my Chambers is essential just to keep the head above water and I am very grateful to them for their assistance.

What Did I Inherit?

An Office that had been thoughtfully and carefully established; generally a lean, efficient and effective operation with an excellent record. But there were flaws, as there must be in any organisation of this type and size and especially in one that developed in the way this one did. There had been (to my perception) too much centralised decision-making. I looked at ways to delegate responsibilities, but that means preparing senior legal staff for that role, having good managers and installing adequate systems and checks. The process is ongoing. The administrative staff, particularly at senior levels, are excellent and take most of the routine administration off my shoulders. In all matters, however, the buck stops with the Director.

"It is often frustrating and tedious, but the trick is to remain an individual ..."

The goodwill and support from all staff was overwhelming and I have tried to reciprocate by consulting widely and freely. I publish a monthly "Director's Letter" to all staff (dubbed "Nick's Natter"). The feedback is generally positive, occasionally downright offensive, but the important fact is that it occurs.

Does Administration Grind Me Down?

Occasionally, but it passes. I must repeat that being a barrister in private practice is pure luxury by comparison (provided you are in sufficient work). For 19 years I was lucky enough to enjoy and benefit from that luxury. The combination of freedom and satisfaction is unobtainable in any other occupation, so it seems to me. Of course, one imposes self-discipline and a regime of practice on oneself in order to operate efficiently; but it is self-imposed, and that's the difference.

By contrast, the DPP must meet the formal requirements of a government office with a large staff, rules, procedures and limitations. It is often frustrating and tedious, but the trick is to remain an individual, not become a cipher, and to make a personal impact where possible and (hopefully) beneficial. I cannot please everyone and I should not try to. I know already that I do not, probably because I tend to be more direct than is customary and I prefer to say what I mean.

Although I have had to get used to the organs of government service, they have also had to get used to me. Sometimes it is quite funny; at other times, pathetic. They are learning too. This all suggests that a member of the NSW Bar can take on (almost) any job.

What are the Office's Three Greatest Qualities?

Independence, independence and independence.

It is often - indeed, almost routinely - necessary to remind all and sundry that the Office is independent and answerable through me to the Attorney as the responsible minister. The theory is well accepted, but occasionally the practice needs reinforcement. I have enough material already for several episodes of a NSW version of "Yes, Minister".

It is no empty and theoretical assertion of independence, however. Victoria is an object lesson for us all (but it is the only one of the nine Australian D'sPP with unsatisfactory legislation, I am pleased to say).

As an indication of the problems that can arise was given in October. After some innocent (so I thought) comments of mine about an odious piece of legislation called the *Crimes Amendment (Mandatory Life Sentences) Bill* 1995 were published, the Premier reportedly made some public remarks to the effect that I was interfering in partisan politics. (I say reportedly, because apart from a chance meeting in a lift and a greeting at a Law Reform Commission seminar the Premier and I have not exchanged a word, oral or written.) The Minister for Police pressed the insult by inviting me, in Parliament, to become a politician. Eventually I gave evidence to the Legislative Council Standing Committee on Law and Justice (under summons) and wrote an article in the *Sydney Morning Herald* explaining my position - so much is public knowledge.

I am not a public servant, but an independent statutory officer, and one who might be expected to have - and to voice - opinions on laws affecting the criminal justice system. I do and I shall continue to do so.

The vice, however, is that in suggesting (inaccurately) that I have engaged in politics and that I might be silenced by the executive government, such commentators inferentially cast doubt on the independence of the office. If that doubt were to spread my operations could be jeopardised.

I think any such doubts have now been dispelled.

What Does the Office Do?

It prosecutes.

The function is simply stated, yet many do not clearly understand. The Office has no investigative role - that is done by police and other agencies. We conduct prosecutions and ancillary court proceedings (appeals, bail hearings, applications for prerogative relief, and so on) and give legal advice in connection with those criminal proceedings (for example, advice to police on the sufficiency of evidence, appropriate charges, grounds for an appeal).

I Mentioned Challenges Posed by Government: What Contacts are there with Government?

I consult regularly with the Attorney on matters of relevance to the Office. The Criminal Law Review Division, presently headed by a Crown Prosecutor, occasionally refers proposed legislation for comment and we make suggestions to it. I am trying to encourage greater consultation, especially where legislation may have practical consequences for the operation of the Office.

One of the matters the government must get used to is that so-called "public outrage" over particular sentences is usually ill-informed and short-lived. All I can do, however, is to provide the facts and put matters in a proper legal context.

The tests I apply in deciding whether or not to prosecute or to appeal are clearly defined and have been published elsewhere. There may well be a degree of public disquiet about what is perceived to be a general decline in the level of sentencing for serious offences, but if so that is a matter for the courts to address. Crown appeals against sentences, in my view, should continue to be exceptional.

What Should be the Guiding Practice of a Prosecutor?

Transparency. Full disclosure must be made of relevant information. Prosecutions are conducted in the public interest by prosecutors who represent the community and the accused and the public have the right to know what is happening and why.

There is one qualification to that: occasionally it may not be appropriate to publish in detail, even to interested parties, the reasons for a decision to proceed or not to do so. For example, it may not be in the public interest for details personal to an individual to be published where they may have influenced the making of a decision and where they are of no other general importance.

In the spirit of openness I have published to the profession at large some notes for guidance on the making of decisions to "no bill", on procedures for pleas of guilty, on elections for judge alone trials and on the tests applied when considering appeals against sentences.

What About Victims of Crime?

They must be kept informed of matters and their views should be sought and considered, but they should not alone determine what action is to be taken. The process of consultation is far advanced and our in-house Witness Assistance Service provides valuable support for victims and prosecutors.

I consult regularly with victims and victims' groups which is a difficult but necessary activity.

What Contacts Exist with the Bar Association?

The Director, the Deputies and all Crown Prosecutors are members. I want to strengthen our ties with the Association. Many Crown Prosecutors come from the private Bar, some return to it. We are keeping those links by being involved in Bar CLE programs, briefing out some prosecutions to the private Bar (as circumstances and funds permit) and occasionally lunching in the Bar dining room and attending Bar social functions. The Crown Prosecutors are in a unique position, being and having the qualities of barristers but at the same time being subject to my direction. That sometimes produces tensions that need to be resolved and our membership of the Association assists.

Am I Keeping Up my International Connections and Human Rights Interests?

Most certainly. So far as criminal justice is concerned it is important to keep abreast of practices and developments in jurisdictions with similar systems and to learn from features of other systems (for example inquisitorial systems) that may be of benefit to us. I keep up my links through the International Bar Association and the Heads of Prosecuting Agencies Conference (amongst other organisations intern-ationally) and with our own Conference of Australian Directors of Public Prosecutions (fondly known as "CADS").

We have staff exchange programs in place and developing. So far this year several lawyers have spent time in Hong Kong; I have made arrangements with Scotland and Canada and I am now making arrangements with the UK and Ireland.

In the human rights field I continue to play a part on various national and international committees, most recently having undertaken a study for the IBA of the Japanese system of pre-trial detention called "daiyo kangoku" or substitute prison. The photograph that accompanies this article was taken in the office of the Kyoto Bar Association in Japan in February.

It shows the President of the IBA, Prof J Ross Harper CBE and Japanese lawyers. But the real interest is that the painting behind us is of a naked woman. What is it about Bar Associations and art?

The IBA has just launched a Human Rights Institute which will be a well resourced and significant force for the promotion and protection of human rights for lawyers and in legal systems internationally. I am the first Co-Chairman of the Institute (with a Norwegian lawyer).

I think I have overcome a first impression in the minds of some that prosecuting and human rights do not go together. In my view they are necessary bedmates.

What Changes Would I Like to See?

The Office should take over the conduct of all summary prosecutions in the State. It is indefensible that police should still be conducting them. I am pressing that issue as hard as I can.

There should be modifications to committal proceedings. The CLRD is examining some proposals. (In the UK committal proceedings were abolished in September.)

Ways should be found - and imposed, if necessary - to bring forward as far as possible the point at which a person charged with a crime is required to commit himself or herself to a course of action: in the first place, to plead guilty or not guilty; and if not guilty, to define the issues that will be contested at the hearing and have as many of them as possible - especially issues of law in which the jury is not concerned - litigated in advance of the trial proper. Limited defence disclosure should be required. The defence should make an opening statement after the Crown opening.

I should have the power, presently held exclusively by the Attorney, to grant immunities. Why should a politician be the one to do that?

There should also be some qualification of the so-called right to silence (in reality a collection of privileges); for example enabling the court and prosecutor to comment appropriately on a defendant's previous failure to make answer to an allegation. The recent UK legislation is a useful model.

Such developments would have consequences for the Office, particularly in the early preparation and disclosure of briefs. They are also likely to attract the "usual" opposition of the private profession but deserve careful consideration.

I would also like to see exchanges between the Crown Prosecutors and Public Defenders. I have long held the view that an advocate does a much better job if he or she knows what it is like to be at the other end of the Bar table.

As to matters of form: the Office had a logo that looked remarkably like the central part of the British Royal coat of arms (as represented in the Supreme Court). The Crown had an undue prominence: but no more - the logo was changed from 1 July 1995 to reflect the law and the State. Republican? Maybe.

More generally, I would like to see: wigs for counsel done away with and all advocates in superior courts (barristers and solicitors) wearing simple robes with some mark of distinction for senior counsel; majority verdicts (11/1); victim impact statements; Crown appeals from directed verdicts of acquittal on a point of law; and so the wish list goes on ...

How Long Will I Be Director?

It is an indefinite appointment, or a life sentence. I shall stay for as long as I enjoy it and can make a useful contribution and unless something better comes along. I can only be removed if I become mad, bad or broke, so that gives some scope.

And Siberia?

The Dalai Lama's motto is: "Be happy and useful". It's a fine ambition and I urge it upon everyone.

A degree of isolation is probably necessary. The cliché "it's lonely at the top" holds true to an extent. It is not a popularity quest and I am not a politician. I constantly have to make decisions of all kinds that will inevitably displease some people, including some of my staff. Not losing sight of the boundaries and keeping the right balance are probably the keys to an eventual escape from exile. We'll see.

It is an indication of the degree of that isolation that I had to ask myself these questions . ❑ N R Cowdery QC

Not So Appealing

(*State Rail Authority of NSW v Bauer & Ors*, High Court of Australia Special Leave Application 18 April 1995)

Deane J:	Mr Bennett, how many hearings have there been so far in this matter?
Mr Bennett:	Four, your Honour.
Deane J:	Four?
Mr Bennett:	Yes.
Deane J:	What success has your client enjoyed to date?
Mr Bennett:	None, your Honour.
Deane J:	So you are 10:nil against you.
Mason CJ:	Even if you were to succeed in the High Court, you would still be behind the score board, would you not?
Deane J:	Except if we sat seven, you would be up to 7:10.
Mason CJ:	You would be getting closer.
	...
Mason CJ:	Thank you, Mr Bennett. The Court need not trouble you, Mr Menzies.

(Special leave application refused). ❑

Should Judges Have Performance Standards?

John Basten QC

A paper delivered to the 1995 NSW Legal Convention

In 1980 I wrote a short piece for the *Australian Quarterly* supporting the establishment of a Judicial Commission.[1] As I then noted, the suggestion was by no means novel. I proposed that

> *"... each jurisdiction in Australia should establish a Commission with two principal functions: first, the selection of a small group of candidates for appointment to each judicial office and, secondly, the investigation of complaints of misconduct on the part of all judges and magistrates within that jurisdiction. Ancillary functions could include the organisation of training workshops and seminars for magistrates and judges and the preparation of a code of judicial conduct."* [2]

By a coincidence of history, a Judicial Commission was established in New South Wales in 1986.[3] That legislation, like all significant matters of law reform, had many causes. The most widely acknowledged cause was a series of public scandals arising out of *"The Age"* tapes in February 1984. However, the speedy reaction of the Government of the day was possible partly as a result of work which had already been undertaken by, amongst others, the Law Foundation of NSW, then under the guidance of Terence Purcell.

Why then, in 1995, do we continue to debate the issue of accountability? The answer is that, as with so many important legal reforms, they tend to inspire rather than quell public discussion. This is not a perverse result, nor does it indicate that a reform is misguided. Rather, significant legal reforms tend to reflect underlying public concerns and, once enacted, provide a focus for continuing debate and for refinement of the response. More importantly, there were some important omissions from the *Judicial Officers Act* which require consideration.

Public discussion of judicial accountability always seems to raise concerns about intrusions upon judicial independence. Thus, independence and accountability appear to be mutually inconsistent. That, however, is not necessarily the case at all: indeed, the contrary may be true. As one commentator on the NSW Act has argued:

> *"Judicial accountability and judicial independence are not inherently inconsistent. It is true that the more we scrutinise the behaviour of judges, the greater the likelihood that attempts will be made to exert improper pressure on them; but whether or not judicial independence is, in fact, impaired will depend on the features of the system of accountability which is in place. If a given system of judicial accountability has sufficient safeguards to ensure that it cannot be manipulated to the detriment of the judges and is also able to generate or enhance public confidence in the judiciary, through the public's knowledge that instances of judicial misconduct and disability will be appropriately dealt with, it will provide judicial accountability and, at the same time, enhance judicial independence."*[4]

Mr Morabito, from whom the foregoing quotation was taken, has suggested a number of changes to the *Judicial Officers Act* which, he persuasively argues, would improve its effectiveness. One matter to which he adverts is the absence of any power in the Commission to establish a code of judicial conduct. He asserts that a provision which would have required the Commission to formulate such a code was withdrawn by the Government under pressure from the judges of the Supreme Court.[5]

Without staying to analyse the basis on which this pressure was brought (let alone questioning the propriety of such judicial lobbying (if it occurred)) the author quotes in reply from the former Chief Justice of the South Australian Supreme Court, who warned:

> *"...if security of tenure is to mean anything, it must at least mean that the security can only be disturbed for breach of some clearly enunciated and promulgated rule of conduct. Strangely, however, codes of judicial conduct are unknown in England and in the countries whose legal systems derive directly from the English system."* [6]

"... independence and accountability appear to be mutually inconsistent."

The need for an appropriate level of specificity in defining "proved misbehaviour" being one acknowledged element of relevant misconduct has been argued by Professor Goldring, now Dean of the Law School at Wollongong University.[7] Professor Goldring thought it would have been appropriate for Parliament itself to spell out relevant guidelines, leaving the detail to the Judicial Commission.[8]

In considering what might be considered inappropriate conduct on the part of a judicial officer, it is necessary, as the NSW Act does, to distinguish conduct which might disqualify

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1. J Basten, "Judicial Accountability: A Proposal for a Judicial Commission" [1980] AQ 468-485.
2. Ibid, p 481.
3. See the *Judicial Officers Act* 1986 (NSW).
4. V Morabito, "*Judicial Officers Act*, 1986 (NSW): A dangerous precedent or a model to be followed?" (1993) 16 UNSWLJ 481, 490.
5. Ibid, p 500.
6. L J King, "Minimum Standards of Judicial Independence" (1984) 58 ALJ 340, 345.
7. J Goldring, "The Accountability of Judges" [1987] AQ145, 155-6.
8. Ibid, p 160.

from office from that which might justify a lesser sanction. However, whilst the distinction is clearly appropriate, its consequences are less obvious. Some care must be taken to establish what sanctions are appropriate for misconduct not warranting removal.

It is also necessary to distinguish conduct in office (and possibly professional misconduct preceding appointment) from personal misconduct. I am inclined to think that the Australian community takes a somewhat more robust view of youthful indiscretions (particularly of a personal kind) for people in public office than appears to be the case, for example, in America. Nor do we appear to be quite so fixated on the sexual antics of our public figures as do the British.

It is also useful to distinguish pre-appointment and post-appointment conduct. If possible, pre-appointment conduct should be dealt with by appropriate screening, although there will always be cases in which earlier misconduct will only be discovered after appointment. This matter is likely to have increasing significance if, as I hope, governments will tend to heed calls to ensure that the judiciary is representative of our society and, so far as reasonably possible, not merely recruited from the senior members of the Bar. If this trend, which is already apparent, is to continue, there is increasing danger that informal selection and appointment mechanisms will no longer be effective and that a greater degree of formality in screening will be seen as necessary. If that be the case, it is preferable to establish mechanisms before a scandal arises.

In my view, both these goals can be substantially achieved through the vehicle of the Judicial Commission. First, as I suggested in 1980, I think it appropriate that the Commission have a role in recommendations for appointment and in screening candidates for appointment to judicial offices under its scrutiny. I do not recommend that the power of appointment be taken away from the Executive arm of government, as that in itself involves a level of public accountability. However, the process of appointment should be as transparent as possible if accountability is to mean anything. Whilst I support the view that the Judicial Commission should have minority representation from outside the legal profession and the judiciary, it would not be appropriate to give the Commission too great a say in the appointment process or it would become a self-perpetuating oligarchy. On the other hand, an attorney general may be less willing to promote to high office a friend who may appear to lack the necessary skills and experience if the proposed appointment were subject to comment by the Judicial Commission because the Commission could be required in its annual report to indicate whether or not it had reported adversely on any appointments in fact made by the attorney.

Secondly, the Commission should, subject to appropriate parliamentary consent, establish a code of conduct which should specify the standards expected of judicial officers and also the consequences which might obtain in the case of contravention. Despite the cases of inappropriate behaviour which have arisen from time to time, both in this country and elsewhere, there is surprisingly little agreement on what constitutes conduct which should properly give rise to removal from office. Given the regularity with which members of the professions are deregistered and the presumably higher standards expected of the judiciary, it is surprising that such matters have not been more precisely defined, but perhaps it may be thought that any element of corrupt conduct in office would be sufficient to warrant dismissal. On the other hand, as the ICAC has demonstrated, corrupt conduct is itself a phrase of imprecise denotation. Turning to personal standards, there is equally little discussion of whether a judicial officer who commits an offence punishable with imprisonment should be subject to dismissal or whether the offence should be one of dishonesty. Would subjection to an apprehended violence order be sufficient to warrant dismissal? Do we expect higher standards of our politicians than of our judiciary?

" Do we expect higher standards of our politicians than of our judiciary? "

Perhaps more importantly in practical terms, what is to be done with cases of misconduct falling within the lower range of culpability? This too is an area on which the *Judicial Officers Act* is curiously unhelpful. The drafter appears to have assumed that such matters could best be dealt with by the chief judicial officer of the court or tribunal in which the offender sits.[9] This does little in principle to assist with complaints of consistent rudeness in court, consistent lateness on the bench or other similar misconduct, minor in terms of each infraction but rising, possibly, to a level of moderate severity when part of a pattern of dereliction.

Similarly, one would wish to have, adopting the phraseology of Justice Sackville, guidelines as to effective communication (especially in relation to litigants in person) and the identification of appropriate responses to sensitive cultural and social issues. The response of the *Judicial Officers Act* in such cases is apparently to formalise the responsibility of the head of a court to provide a tactful rap over the knuckles or other form of reprimand or instruction. On the other hand, there may be legitimate concerns about the power exercised by a chief judge. He or she may already have significant control over listing arrangements, which may or may not be exercised democratically within the court. Although it took various turns in the course of the years, the case of Justice Jim Staples started with the refusal of the head of the Australian Conciliation and Arbitration Commission to assign him to hearings as part of the normal work of the Commission.[10]

9. See *Judicial Officers Act*, s.21: the matter may, if sufficiently serious, be referred to the Conduct Division.
10. See M D Kirby, "Judicial Independence in Australia Reaches a Moment of Truth" (1990) 13 UNSWLJ 187, 210.

In putting forward these suggestions, I am conscious that judges are accountable in many ways. For example:

(a) they conduct hearings in open court and must publish reasons for their decisions;
(b) their judgments are subject to appeal;
(c) they are subject to applications that they not hear cases (and ultimately to appeal) on the ground of bias;
(d) they are now subject to the disciplinary powers of the Conduct Division of the Judicial Commission; and
(e) they are required to retire at 70, which at least limits the scope for inadequate performance based on old age.

There are three further points which deserve closer scrutiny than they have had in recent times. First, there is the difficult area of "incompetence". Whilst it may be said that incompetent judicial performance can be remedied by appeals, there are at least two respects in which this answer is unsatisfactory. First, appeals are costly (to all parties to litigation and to the public purse) and should really provide a remedy for the correction of unexpected error rather than routine correction of inappropriate decisions. Secondly, many modern tribunals are immune from correction on the basis of factual error. This latter phenomenon appears to reflect two policies: first, there is the attempt in specific areas to vest exclusive fact-finding power in specialist bodies and, secondly and more generally, an attempt to limit the expense and delay caused by rights of appeal.

"... the Bar ... a collection of notoriously egocentric characters unused to working collectively or under instruction."

For people with small disputes, it is not a sufficient response to say that rough justice is adequate. Whilst individual remedies may be inappropriate, greater attention should be paid to improvement of judicial performance, especially in areas where judicial officers are not subject to factual review. Better selection procedures, mechanisms for identifying areas of judicial weakness and schemes for improving judicial performance are required. As Justice Ronald Sackville recently noted:

> *"The emergence of judicial education programmes is an acknowledgement that judging requires a combination of skills not all of which are necessarily possessed by every appointee to judicial office. The idea that all judges (including magistrates) arrive fully equipped in terms of legal and procedural knowledge, administrative and technical skills, temperament, the ability to communicate effectively and respond sensitively to cultural and social issues, is hardly tenable."* [11]

Each of the matters to which his Honour referred are no doubt susceptible to programmes of education, although the courts appear to be still in the process of working out how such education can be most effectively provided. Whether mandatory courses are feasible seems open to doubt: if feasible, there is equal reason to doubt whether they would be effective. On the other hand, do those judges most in need of further training attend the relevant voluntary sessions? Judges, especially on the superior courts, still generally come from the Bar, which contains a collection of notoriously egocentric characters unused to working collectively or under instruction. These are perhaps cultural matters which will need to change.

There are also structural pressures which will apply to some judges and in some circumstances. Thus, whatever may be said in principle about the independence of the judiciary arising from its secure tenure, some judges are appointed on an acting basis and others may well hope for promotion. Such exigencies do, as Justice Michael Kirby has noted, derogate from judicial independence without promoting appropriate accountability.[12]

Further, the foregoing comments have been directed to judicial accountability at the individual level. It is also necessary to consider accountability in terms of allocation of court resources and, indeed, allocation of public resources to courts and tribunals. In these areas, the tenets of judicial independence have provided, not always persuasively, a platform from which to launch demands for judicial self-governance. In short, the power of the Executive to limit and control the judiciary through financial constraints (particularly in inflationary times) has given rise to concern, especially within the courts. New South Wales has tended to be less concerned than, for example, South Australia and the Commonwealth in heeding demands for self-governance. However, it is clear that self-governance itself will lead to a new relationship between the judiciary and the Executive. As Justice Sackville has persuasively argued:

> *"Administratively autonomous courts, like other public sector bodies must not only compete for resources, but must actively press their claims through the political and budgetary processes. They can no longer rely - if they ever could - on Ministers or departments to carry the burden of protecting and advancing the interests of the judiciary. ... It follows that judges must to some extent participate in the community debate about the allocation of public funds. Of necessity, they must sometimes be caught up in matters of political controversy."* [13]

There are other aspects to judicial accountability which should also be considered. One has the feeling (although it

11. R Sackville, "The Access to Justice Report: Change and Accountability in the Justice System" (1994) 4 JJA 65, 71.
12. M D Kirby, op cit, p 209.
13. Ibid, p 74.

would be interesting to know if the feeling is objectively supportable) that judges are increasingly active in other spheres in recent years. By that I do not refer to the tendency of judges of a court to be involved in professional disciplinary tribunals, although that is a common phenomenon, because there they continue to exercise judicial functions. Rather I refer to the expectation that judges will issue search warrants, preside over commissions of inquiry and even speak out on matters of public importance. Inevitably, the response to such requests and expectations is neither uniform nor unambiguous. On the other hand, the tendency for judges to be seen in roles where demands for accountability will not be tempered by respect for judicial independence may flow over into consideration of judicial functions. I do not seek to argue that the purity of the judicial function should be preserved at all costs, but would suggest that some care must be taken in formulating appropriate mechanisms for accountability, specifically in relation to the exercise of non-judicial functions.

Finally, in terms of public accountability, it is worth noting the role of the media. In a country which is proud of its free press, and remains conscious of threats of monopolistic influence, there will always be an important role for the media in publicising the work of courts and judicial officers and highlighting apparent misconduct. There remains debate about the extent to which such public comment in the press is useful or constitutes "the attrition of uninformed and unjustified criticism" which could, "if not kept in check, cause great, even irreparable harm to the system itself".[14] The increasing willingness of the courts and some justices to respond to public criticism, despite the tradition that they not comment on cases in which they have been involved, is no doubt a response to the fear of harm to the institution as well as, at least in some cases, the unwillingness to accept public criticism without reply. On other occasions, the President of the Bar Association has considered it desirable to reply on behalf of the court or individual judge. Sometimes these replies provide useful information and a convincing answer to the criticisms. At other times, they appear to do more harm than good to their own cause. What may be noted in this context is that there is a diminishing likelihood of charges of contempt of court being used to protect the judiciary from criticism, except in defence of the jury process. This must be recognised as a move towards greater public accountability, although the results may be debatable in individual instances.

Conclusions

In Australia in 1995, I do not believe that calls for improved judicial accountability are either unexpected or even controversial. The system for delivering justice in our community is under strain and must adapt. Whilst we are rightly proud of our tradition of judicial integrity, that tradition will only survive if we adopt appropriate principles in its defence. These principles apply both at a structural level and at an individual level. Over-worked judges can make mistakes and delay in bringing down judgments. It is nevertheless clear that some judges perform better than others. Similarly, judges will bring a range of views, experience and abilities to their work. We must continue to develop systems to limit incompetence without outlawing variety and to improve performance without inappropriately altering the balance between the judiciary and the Executive. However, if judges are required to perform, they must know in advance what standards are required of them. Those standards should encompass both personal and judicial behaviour. As a society we must decide whether a judge who regularly reserves judgments for more than, say, nine months is performing properly. We must also decide whether a judge convicted of tax evasion or for domestic assault is entitled to continue in office. Such cases have arisen in the past and will undoubtedly arise again. If at all possible, standards should be established without the public clamour for resolution of a particular scandal. The Judicial Commission should be restructured as recommended by Mr Morabito and should set about the task of preparing a code of judicial conduct. ❑

14. Comment of Justice Hope of the NSW Court of Appeal on his retirement, quoted by Justice Kirby, op cit, p 188.

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Some Observations on Robertson v Balmain New Ferry Co

***Address by J W Shaw QC, MLC, NSW Attorney-General to the Macquarie University Law Society on 17 May 1995 on the occasion of a dinner held to commemorate the ninetieth anniversary of the attempted ferry ride of* Robertson v New Balmain Ferry Co Ltd.**

It was a crisp winter's evening some 90 years ago - Monday June 5th 1905 to be precise - at about 7.45 pm when Archibald Nugent Robertson, Barrister-at-Law, strolled to the wharf of the Balmain New Ferry Company at the foot of Erskine Street, Sydney for the purpose of proceeding to Balmain. With him on that fateful night was a companion, one Mercy Murray, Bachelor of Arts and teacher of singing and elocution. In one of life's tragic twists, what should have been a joyous celebration of the Monarch's official birthday with Miss Murray and her parents became instead a nightmare, making legal history.

As was the custom in those bygone, politically incorrect days, good Archibald paid a penny each for himself and Miss Murray and both passed through the turnstiles. Sadly, the 7.45 ferry had already left but the ever resourceful Archie had a plan. Rather than wait 20 minutes for another Balmain Ferry they could instead proceed to the adjacent wharf to catch an earlier Leichhardt Ferry. Nothing could have seemed more reasonable and Miss Murray readily agreed.

However, they reckoned without the company men - William Anderson and Sydney Thomas Penson - who had their instructions. No-one was to enter or leave the wharf without payment of a penny. When Archie attempted to exit through the turnstile without paying the additional penny the officious Anderson pushed him back and Penson threw his arms round him. No reasoned argument or even threat of legal action could budge them. A crowd gathered and, according to the *Sydney Morning Herald*, Archie and Mercy "were subject to considerable annoyance, some members of the crowd satirically inquiring why he did not pay his fare".

Ever gallant, Archie ransomed Miss Murray by payment of another penny and she repaid his gallantry by returning with a Constable Frazer. But alas, Frazer proved unequal to the opportunity which fate had assigned to him and he did nothing to release the captive, advising only that Archie should pay the additional penny. This, of course, was unthinkable and Archie remained imprisoned until a momentary lapse in concentration by his gaolers allowed him to make good his escape.

October 12, 1922, p.14.

Barrister A. Nugent Robertson, who died at Mona Vale (N.S.W.) the other day, aged 66, had little legal practice, but got occasional jobs as Crown Prosecutor on country circuits. For 31 years he had been the legal visitor at mental hospitals, in the metropolitan area, and he did a good deal of journalistic work and wrote some novels. A few years ago he got into legal holts with the Balmain Ferry Co. Robertson had been seeing a friend off on the ferry, and had paid his entry penny at the turnstile, but, when he wished to come out again, the attendant demanded the exit penny. This Robertson refused, and was "detained." In the action he got £100 damages, but the Ferry Co. went to the Full Court, where the verdict was set aside, and the costs came to more than the penny exit fee.

These are the sorry facts upon which Archie mounted an action for assault and false imprisonment in the Banco Court before the NSW Chief Justice, Sir Frederick Darley and a jury of four.[1] Archie had a win first up, the good Chief Justice never doubting the justice of his cause and refusing an application for non suit.

The company then asked for a new trial but this request was rejected by the Full Court.[2] The company's case for a new trial was based on three grounds. The first involved a denial that Messrs Anderson and Penson had acted within the scope of their authority as servants of the company. So much for the company's loyalty to its staff! All three judges of the Full Court rejected the argument and it disappeared from the scene. The second and third grounds contended that the Chief Justice had erred in directing the jury that the company had no right to demand payment of a penny from Archie for passing through the turnstile and should instead have directed the jury that if they came to the conclusion that the company had done what was reasonable to give persons going on the wharf notice of the terms on which they were admitted to the wharf, the jury was entitled to find that Archie was bound by the notice. There was, in fact, a notice to the effect that a fare of one penny must be paid on entering or leaving the wharf whether or not the passenger had travelled by the ferry but we don't know whether Archie or Mercy saw it and the Higher Courts thought the notice was irrelevant.

None of the Full Court judges seems to have doubted that Archie had been assaulted and falsely imprisoned. Even Cohen J (dissenting), who favoured a new trial, would have done so for the assessment of damages only. Had the company done all that it could have been reasonably asked to do in order to give notice of the terms on which the public could enter and leave the wharf, Archie should be held bound by the notice but the notice would not have justified the acts of the company. Notice was relevant only for the assessment of damages.

Owen J adopted similar reasoning but found there was insufficient evidence to justify the jury in holding that Archie had notice; Pring J adopted a strong line against the company holding that, even if Archie had known of the notice, his rights were equally infringed. Notice could not afford any extenuation of the wrong committed by the company.

1. NSW Supreme Court 1-2 December 1905, unreported. See the *Sydney Morning Herald* 1 December 1905, p 10; 2 December 1905, p 11.
2. *Robertson v Balmain New Ferry Company* (1906) 6 SR (NSW) 195.

Enter the High Court and Archie's fortunes began a slide from which they were never to recover. By a 3-0 decision[3], the High Court ordered a verdict for the company, even though it had only asked for a new trial.

Chief Justice Griffith denied there had been imprisonment because Archie "was free to leave the premises by water". As to the alleged assault, his Honour found that Archie had been on the wharf a number of times; was aware of the terms on which he had obtained admittance; and it followed that he had agreed to be bound by them. There was no evidence that anything done by the company was not authorised by the agreement to which Archie was a party.

O'Connor J, who delivered the leading judgment and with whom the Chief Justice and Barton J agreed, seems also to have decided the matter by reference to contractual rights and obligations. A person may enter into a contract which necessarily involves the surrender of a portion of the person's liberty for a certain period and, if the act complained of is nothing more than a restraint in accordance with that surrender, the person cannot complain. Nor can the person, without the assent of the other party, by electing to put an end to the contract, become entitled at once, unconditionally and irrespective of the other party's rights, to regain the person's liberty as if the person had never surrendered it.

In Archie's case, Justice O'Connor said he had entered on to private property of his own free will and with the knowledge that the only exit on the land side was through a turnstile, operated as part of the company's system of collecting fares. The penny payment was a lawful condition of exit and Archie only had himself to blame if he refused to pay.

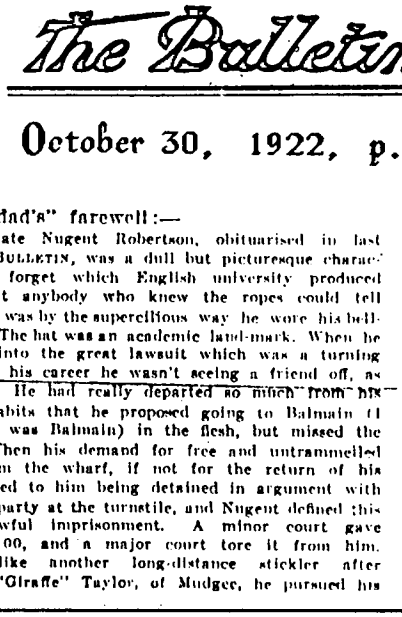
The colonial barrister got even shorter shrift from the Privy Council[4]. Archie, their lordships said, was merely called upon to leave the wharf in the way in which he contracted to leave it. The payment of a penny was a fair condition and if Archie did not choose to comply with it, the company was not bound to let him through. He could proceed on the journey he had contracted for. Our hero was dismissed with the hurtful judicial jibe that their lordships regarded Archie's conduct as thoroughly unreasonable.

We are not told if Archie won Mercy (that is, Miss Murray) but he clearly didn't win justice.

Let's look first at the issue of whether or not Archie was, in fact, imprisoned. Although the other judges seemed to have assumed imprisonment had taken place, Chief Justice Griffith thought not. Archie "was free to leave the premises by water". That argument, if you will excuse an obvious pun, does not seem to hold much water. What if Archie couldn't swim? What of those denizens of the deep, which at any time could have been lurking near the wharf eager to tear to shreds the foolhardy or the desperate? Surely Archie should not have been required to risk life and limb when a much safer and practicable alternative was available.

Probably his Honour's remarks should be interpreted as a reference to the likely eventual arrival of the Balmain Ferry. Several commentators have sought to latch on to this escape route. Amos[5] suggests that it would seem to have been possible for Archie to have left the wharf after some delay and that if this had not been possible, the decision would have been different. Glanville Williams, in his analysis of the case[6], said that "the contractual path of escape was never closed to him. He was not deprived of his liberty".

But, surely, the arrival of the Balmain Ferry would not have prevented imprisonment - only brought it to an end. Imprisonment on the wharf for 20 minutes may not have ranked Archie in the annals of history alongside the likes of Captain Dreyfus but imprisonment for 20 minutes is no less imprisonment. The length of imprisonment is, no doubt, a relevant factor to be taken into account in assessing damage but not, other than in extreme examples, in determining whether or not imprisonment has taken place.



The Bulletin.

October 30, 1922, p.14.

"Bildad's" farewell:—

The late Nugent Robertson, obituarised in last week's BULLETIN, was a dull but picturesque character. I forget which English university produced him, but anybody who knew the ropes could tell which it was by the supercilious way he wore his bell-topper. The hat was an academic land-mark. When he drifted into the great lawsuit which was a turning point in his career he wasn't seeing a friend off, as alleged. He had really departed so much from his usual habits that he proposed going to Balmain (I think it was Balmain) in the flesh, but missed the boat. Then his demand for free and untrammelled exit from the wharf, if not for the return of his penny, led to him being detained in argument with the old party at the turnstile, and Nugent defined this as unlawful imprisonment. A minor court gave him £100, and a major court tore it from him. Then, like another long-distance stickler after trifles, "Giraffe" Taylor, of Mudgee, he pursued his case to the Privy Council, and so moved that body out of its wonted calm that it told him that it experienced an unholy joy in deciding against him, he having been "thoroughly unreasonable." After that the litigant rushed into print till editors grew weary. He was one of the "Prudent Federation" candidates for the Federal Convention. These people, of the good old Geebung brand, were so prudent that they wanted to limit the Federal power to the establishment of a uniform dog-tax or something like that. I fancy there were five of them, and they were left in a very solid block at the foot of the poll. For the rest the deceased barrister was an amiable but rather mirthless companion. Whether he ever finished his interrupted penny journey across the harbor I know not.

3. *The Balmain New Ferry Company Limited v Robertson* (1906) 4 CLR 379.
4. *Archibald Nugent Robinson v Balmain New Ferry Company Limited* [1910] AC 295.
5. M S Amos, "A Note on Contractual Restraint of Liberty" (1928) 44 LQR 464.
6. G Williams, "Two Cases on False Imprisonment" in Holland and Schwarzenberger (eds), Law Justice and Equity (1967) pp 47-55.

As to the notion of contractual surrender of freedom put forward by Justice O'Connor in the High Court, it seems to me that Archie was entitled to demand his freedom, even if this constituted a breach of contract. He may well have been liable for the demanded penny in damages for that breach but that is another issue. Consent to imprisonment must be able to be withdrawn and, once withdrawn, liberty should be restored as soon as reasonably practicable. Several references to trains not being required to make unscheduled stops in order to let down disgruntled passengers and planes not being required to land in order to allow off flight attendants who have terminated their employment mid flight have been put forward to justify Archie's continued imprisonment[7]. So too, in Herd's case[8], the House of Lords held that a miner who refused to work was held to have no right to be brought to the surface until completion of his shift. But, in the end, Archie asked no more of the company than its forbearance as he made his escape. No positive act by the company was required and no inconvenience to it would have resulted. Indeed, it required a positive act of restraint by the company to detain Archie and deprive him of his freedom.

It is, of course, true that Archie could have purchased his freedom by payment of the penny. But the impecuniosity of the NSW Bar is a well known fact of which any court should take judicial notice. Having purchased Mercy Murray's freedom with (perhaps) his last penny, should Archie have been left to languish on the wharf - penniless - merely because payment of a further penny was a reasonable price to pay for his freedom? Was the Privy Council attempting to sanction a 20th century colonial debtors' prison? Perhaps the Erskine Street wharf was to replace the infamous hulks. A creditor cannot imprison a debtor to compel him to pay a debt. An earlier decision (of 1838) was correct: in *Sunbolf v Alford*[9], it was held that an innkeeper could not imprison a guest until the bill was paid.

No, Archie was, in my view, dealt with unjustly. A man of principle, although perhaps obsessive, was sacrificed on the alter of the sanctity of contract. Whilst there are those, including some academics of Macquarie University, who may yearn for those bygone days and who decry common law and legislative reforms in contract law as revolutionary and damaging assaults on will based contracts[10], I stand with Archie. Basic rights should be considered and balanced against the black letter law of contract. We do well tonight to recognise his place in legal history and to accord due honour to a martyr to the cause of liberty! ❑

7. See Keng Feng Tan, "A Misconceived Issue in the Tort of False Imprisonment", (1981) 44 MLR 166.
8. *Herd v Weardale Steel, Coal and Coke Co Ltd* [1915] AC 67.
9. (1838) 150 ER 1135; discussed by Glanville Williams op cit.
10. John Gava, "Assault on contract law a threat to freedom", *The Australian* 19 April, 1995.

Courtrooms and Television

The O J Simpson trial, long before it has finished, provides an important precedent. It demonstrates that allowing television cameras into courtrooms is a ghastly mistake.

Nobody outside the court watches the whole case. Even the most complete of the coverage is edited and interrupted by commercials, newsflashes and sports results.

This coverage is watched as an alternative to the midday soaps by those at home, and in gymnasiums all over the United States to offset the boredom of tread machines, stationary bicycles and weight circuit training machines in workout-length bites.

The news programs focus on the gruesome bits and such fascinating items as the prosecutor, Marcia Clark, being dressed down by Judge Ito for wearing, in court, the lapel badge of the Victims Support Group, an injured silver angel (I am not joking).

Another high spot focused on by the media was evidence as to the tone and loudness of the victim's dog's bark, which laid the ground for evidence about the mood of the dog by the person who heard it.

The *LA Times* published a cartoon of the dog "on the stand", as they say, being asked, "And what was your state of mind when you barked?".

My next favourite was after the defence mounted an attack on the forensic skills of the police at the scene, widely, nay ubiquitously, reported.

The Commissioner of Police went on television to urge the "public" to show solidarity with the LAPD by wearing blue ribbons in their lapels!

A stand-up comic on TV told how he had been watching the trial, very closely, "AND there is one man in that court who looks very guilty to me", he said, "and that man is Judge Ito!".

Every piece of evidence is commented on by alleged experts, predictions of prosecution and defence tactics are made by trial lawyers desperate for a piece of the publicity, and on and on.

How this trial can fail to miscarry in this circus is hard to see.

In a survey of criminal lawyers (of the most doubtful validity), 84% said that O J would be acquitted if not at trial then on appeal, because of the impossibility of a fair, unbiased and rational trial.

We must not let this awful phenomenon infect us across the Pacific as so many social diseases have. ❑

John Coombs QC

New South Wales Bar Association 1995 Tutors' and Readers' Dinner

The Hon. Justice M H McHugh AC spoke at the June 1995 Tutors' and Readers' Dinner.

It is a great pleasure for me to be the guest of honour at this year's Tutors' and Readers' Dinner. I was at, what I believe was, the first institutionalised Tutors' and Readers' Dinner in 1961, the year that I was admitted to the Bar. I understand that, at irregular intervals during previous years, informal Tutors' and Readers' dinners had been arranged by individual members of the Bar. But 1961 was the year when the New South Wales Bar first organised reading lectures and made attendance compulsory.

Mr Vice President, the course of reading lectures in 1961 was much inferior to the course that the Bar runs today. On the other hand, we did not have to pay $1,000 to enter the course. Our course was free. It consisted of half a dozen or so lectures held at night in the Common Room over a period of some months. Any barrister could attend the lectures. When J W Smyth QC gave his famous lecture on cross-examination in 1961, most of the then 422 members of the Bar attended.

From the start, the Reading Programme was a success. It certainly helped me avoid many mistakes that I am sure that I would otherwise have made. Of course, like most new barristers, I made my share of mistakes. But making mistakes in the conduct of litigation is not confined to new barristers. Take the case of a young Equity silk who cross-examined a defendant a year or two ago. The cross-examination went like this:

Young silk: "I want to put this proposition to you. You used the company's money for your own purposes?"
Defendant: "No."
Young silk: "Look at the document I hand to you! Isn't that a sworn statement, in your own handwriting, in which you admit that you used the company's funds to pay your own debts?"
Defendant: "No. I have never seen this document before today."
Young silk: "Do you seriously tell his Honour that this is the first occasion on which you have seen the document that I just handed to you?"
Defendant: "Yes, I do. The document you just handed me is headed - 'Notes for Cross-examination of the Defendant'."

One advantage in being a High Court Justice is that you get the opportunity to read the transcripts of trials conducted throughout Australia. Styles of advocacy differ from State to State. One thing that has struck me is that few interstate practitioners have adopted the New South Wales technique of putting a series of propositions to a witness at the commencement of the cross-examination. This technique was used with great effect by two legendary cross-examiners at the New South Wales Bar - J W Smyth QC and J W Shand QC - and during my time at the Bar became something of a Sydney tradition. The cross-examiner begins by getting the witness to agree that he or she accepts the validity or truth of one or more propositions concerning what would be expected of a person who was honest, reasonable, prudent and so forth. The cross-examiner then questions the witness in such a way that, if the witness gives an answer contrary to what the cross-examiner wants, the witness, on his or her own admission, must be dishonest, unreasonable, imprudent, and so on. In the hands of a skilled practitioner, it is a very effective technique. But it is a technique, not without its dangers, as a Sydney silk found out some time ago when cross-examining a quick-witted witness in a Supreme Court action. The transcript reads:

Stitt QC: "I would like to put a proposition to you."
Woman Witness: "You would? My luck has changed at last."
His Honour: "I think you had better wait until you hear what the proposition is!"

At the next adjournment the exchange continued when Stitt and the witness met in the lift:

Woman Witness: "Still interested in that proposition?"
Stitt QC: (not to be outdone): "Madam, I hope you realise that, under our Bar Rules, whatever I get, my junior must get two-thirds."

There can be little doubt, I think, that the Bar no longer has the high standing that it once had. The barrister of today certainly does not have the same hold on the public imagination as his or her counterpart of earlier times seems to have had. Leading counsel in the Victorian and Edwardian eras were public figures. When Sir Edward Clarke QC, a leading English silk at the turn of the century, attended the theatre on the night of one of his great forensic triumphs, the audience rose and applauded him. Leading silks at today's Bar would love that kind of adulation. Imagine David Bennett QC, in top hat, cape and tails, entering the Opera House after another triumph in the High Court of Australia. Of course, not every silk would like it. Shy, self-effacing QCs - like Tom Hughes - would be forced to slip into the theatre after the lights had gone out. Sadly, for the Bar, however, the days when barristers were public idols are gone.

The public idol of today is the film or television star, the pop star, and the sporting hero. Perhaps the lack of public interest in the personalities of today's barristers means that they are not as colourful as their predecessors. However, the media interest in colourful solicitor-advocates such as Chris Murphy suggests that advocates can still excite public

attention. Nevertheless cases do not get the publicity they once did. In my early years at the Bar, there were two afternoon papers in Sydney. Both they and the morning papers carried very lengthy reports of cases, often setting out long verbatim extracts of cross-examinations and counsel's addresses. I would think that, as late as 1965, many of the leading silks were household names in Sydney. But those days are gone. There is no prospect of even the most colourful advocate competing for public attention with pop stars like Michael Jackson or Madonna, or film stars like Hugh Grant.

However, it is not the loss of the Bar's glamour that is worrying. What is worrying is the undoubted fact that in recent years there has developed a perception, particularly among some journalists and politicians, that barristers are persons with grossly inflated egos who are not interested in justice and whose principal concern is to string out cases and make as much money as they can from the conduct of litigation. If that perception is true of some barristers, it is not in my experience, and never has been, true of the very great majority of barristers.

Like Sir Owen Dixon, I believe that the role of counsel in the administration of justice is more important than that of the judge or jury. It is counsel who have the responsibility for ensuring that the relevant facts are brought before the court: it is counsel who select the legal and factual issues upon which the decision in a case will turn. If counsel fail to carry out their responsibility, justice, at least justice according to law, will fail. The most able and conscientious judge cannot correct a wrong if counsel have failed to call or extract the relevant evidence or refuse to argue a relevant issue. On the other hand, when counsel present well prepared and well argued cases, the reasons for judgment of even a judge of average ability can be outstanding. It is therefore a matter of great concern to the administration of justice when counsel fail to present a case as well as it should have been presented.

Inattention to the proper preparation of cases is, I think, one of the root causes of much of the present public dissatisfaction with the Bar. Failure to prepare properly causes delay in vindicating rights, lengthens the hearing of cases and thereby increases the cost of litigation, contributes to congested court lists, and leads to settlements that create a sense of injustice among litigants that finds its outlet in criticism of the Bar as an institution.

Having practised at the Bar for 23 years, I know as well as anybody that relevant evidence is not always obtainable or, if it is, that the cost of obtaining it may be prohibitive. I know that law is complex and that the decisive issue is frequently revealed only after the most painstaking and acute analysis and that it is easily missed. I know, too, that a barrister is often brought into a case when it is too late, in a practical sense, to change its direction. But when full allowance is made for these problems, it appears to me and other judges that a significant number of cases are not as well prepared as they ought to be. Moreover, with alarming frequency, courts of appeal - particularly in criminal cases - are asked to consider points that were not raised at the trial. If this trend of failing to conduct cases properly continues, the privileged position of advocates in relation to immunity from actions for damages for negligence is likely to be lost.

It may be, as I think is probably the case, that the number of cases that are not as well prepared as they should be, are a small percentage of all the cases that come before the courts. But, assuming that is so, it needs only a handful of dissatisfied litigants to take their complaints to the media and to politicians to paint a picture of a Bar that is concerned only with its own welfare.

One of the surest ways that the profession can answer the criticism that it is uninterested in seeking just and speedy outcomes to legal problems is to demonstrate that in this State litigation can be conducted expeditiously, efficiently, without excessive technicality and relatively cheaply. I would like to draw attention to a few areas where I think the conduct of litigation can be improved and thereby contribute to the achievement of those goals. Many factors contribute to delay, to congested court lists and to the building up of costs. One of them is the failure of legal advisers to come to grips at an early stage with the real issues in dispute. Much unnecessary expense is incurred in respect of cases that are settled far later than they should be. Clients feel betrayed when, just before or during a hearing, they are told that their cases are not as strong as they were led to believe and that they must settle for less than they expected. Full and early preparation helps to avoid that situation.

"If counsel fail to carry out their responsibility, justice according to law will fail."

In respect of cases which proceed to decision, a great deal of time is often lost in contesting issues which in the end are irrelevant. It is worrying to see Appeal Books with hundreds of pages of evidence that by the start of the addresses have become irrelevant. Not everyone has the courage, confidence and psychological makeup of Sir Patrick Hastings QC who claimed always to have selected a single issue to fight a case on and to have abandoned the rest. But if counsel is on top of the law, the facts and the issues relevant to the case, he or she will not waste the court's time and the client's money by contesting issues which should be conceded.

This is an appropriate point to mention the issue of the rambling cross-examination. Few barristers are blessed with the gifts of incisiveness and economy of words that marked the cross-examinations of the late J W Smyth QC or the late Harold Glass QC. But proper preparation, knowledge of the issues, and a determination to stick to the essential would greatly reduce the length of many cross-examinations. Some counsel seem to embark on cross-examination with little knowledge of what they are after or how to get it. Questions are asked with no knowledge or expectation of the probable answer and with no control of the witness. This results in the unnecessary prolongation of cases with consequent expense

and waste of judicial resources. Sometimes, it results in the destruction of the client's case.

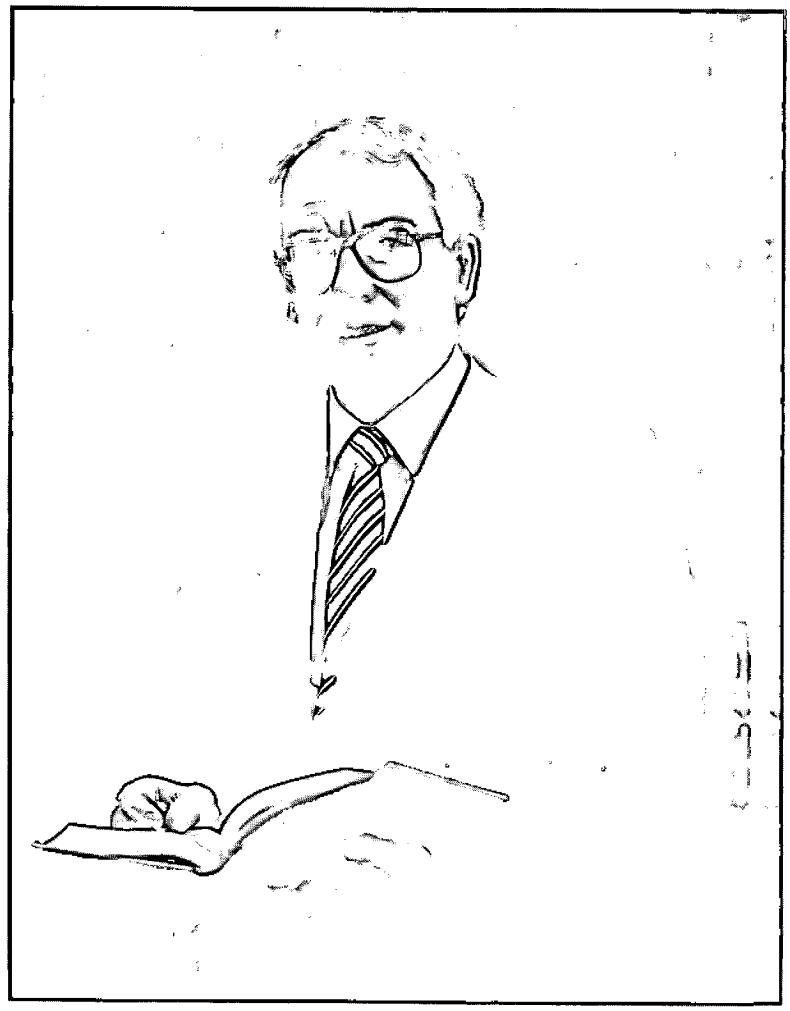
Similar criticisms can be made of some submissions and addresses. Too much time is spent addressing on peripheral issues, on minor inconsistencies in the evidence, and in the reading of long passages, particularly of the facts from reported cases. Reported cases are not statutory texts. They should only be used in argument to illustrate and document general principles and specific rules of law. Insufficient attention is paid in some submissions to developing and establishing a theory of the case which reconciles its facts with the relevant principles of law.

But most of all, a significant number of submissions and addresses are too long.

This Bar has produced no greater advocate than Murray Gleeson QC, and he has always contended that good advocacy is economical advocacy. I agree. No better advocates in presenting special leave applications can be found at this Bar than David Bennett QC and David Jackson QC. Yet their submissions are always short and to the point, often taking a few minutes only. You can count on two fingers the number of times that they have required the full 20 minutes of allotted time to put a special leave application. They put their point or points briefly and concisely.

If you have a point, put it as concisely as you can. Then sit down. If the point is put clearly, the brevity of the submission will not detract from its persuasive force.

Three or four years ago, David Bennett opened an appeal in the High Court at 10.15am, put his point, and sat down at 10.19am. When Sir Anthony Mason said to him, "Have you got nothing further to put?", Bennett said, "Well, I can repeat what I've just said". But there was no need for him to repeat the point. He had seized on the essential point, put it, and sat down. The appeal was allowed.



"... good advocacy is economical advocacy"

...The Hon Justice M H McHugh AC

When counsel complain that a judge or a magistrate was slow to comprehend a point, the cause is more likely to be found in the submission's lack of clarity than its brevity. An argument is clearest when the significance of each new piece of information is understood as soon as it is received. That means that context should be put before detail. Information is most easily comprehended when it can be immediately related to information that is already known. Let the court know what your argument is and how it will be developed before you demonstrate its proof. Let each step follow logically and coherently from the last step.

The short submission also happens to serve counsel's self-interest. It helps counsel to avoid what the late Mr Justice Hutley used to call the judicial uppercut, the unanswerable question that knocks counsel's argument out of the ring. It is a necessary part of the judicial equipment for dealing with the rambling, irrelevant or plainly erroneous submission.

Sir Anthony Mason was adept at using this blow, particularly in special leave applications. On one occasion, after a penetrating question from Sir Anthony, counsel could only dazedly reply, "You Honour has got me on the ropes!", to which Sir Anthony quickly replied, "On the canvas, I would have thought".

It was not for nothing that some of us called Sir Anthony the Muhammad Ali of the Federal judiciary.

Mr Vice President, I loved the 23 years that I spent practising as a barrister at the New South Wales Bar. I envy the Readers of this Class of '95 as they embark on their careers as barristers. I wish them well. I will follow their careers with interest.

I am very grateful to be invited here tonight as the guest of honour at this dinner. I thank you most sincerely for the invitation. ❑

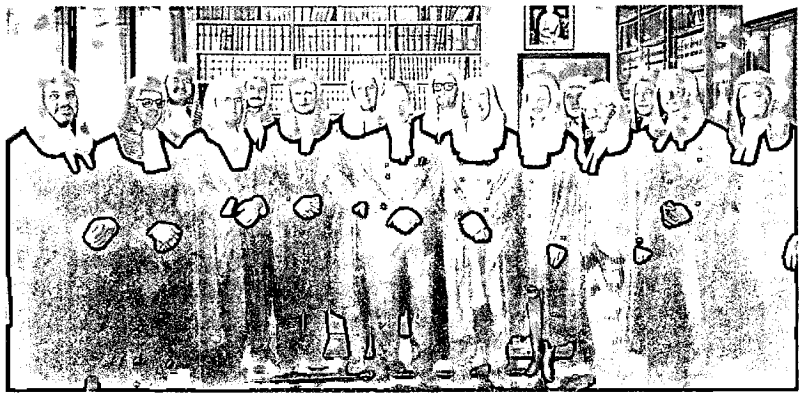
Senior Counsel in the Court of Appeal

On 9 November 1995 the new Senior Counsel took their bows before the Court of Appeal (Kirby P, Clarke and Powell JJA). After congratulating them individually, Kirby P made some general observations:

Having welcomed the newly appointed Senior Counsel, it remains only to say a few words of general approbation. It is an important day for you. It is an important day for the Court. It is also a great day for your families and clerks and other employees. The Court congratulates them all on their contributions to this day.

Two weeks ago I was in Bangalore, India. I was there for the triennial meeting of the International Commission of Jurists. I walked along what used to be called South Parade and is now named Mahatma Gandhi Road - named after the leader of Indian independence, himself at one time a barrister. Bangalore was a garrison town. At one end of the parade is a statue of Queen Victoria which looks remarkably like the statute that is in Queen's Square, Sydney. At the other end is Holy Trinity Church which is an absolute replica of St James' Church, Sydney. Our city was also once a garrison town, with a garrison church. It began as a place of law and order.

As I knelt to say my prayers I looked up and saw a small brass plaque that had "The Hon'ble the Resident". This was the place that The Resident, representing the Crown in Mysore, came to worship. I reflected upon the debts which Australia and India have to that period of our shared constitutional tradition.



(l to r) Stephen Rothman SC, Leslie Katz SC, Cliff Hoeben SC, Alan Robertson SC, Ian Harrison SC, Tony Meagher SC, Dick Edmonds SC, Mr Justice Kirby, David Higgs SC, Robert Keleman SC, Gay Murrell SC, Michael Pembroke SC, John Agius SC, Tim Hoyles SC, David Nock SC, Michael Cranitch SC.

Later in the week I was taken to the High Court of Karnataka State. That is a State in which Bangalore now prospers. The Court was built by the British. The old Royal insignias have all been removed. Yet apart from that, and apart from the absence of wigs, everything else was the same. Absolutely the same. True, they have two judges sitting in appeals. But the conversation that took place between the Bar and the Judges was exactly the same as it is in this courtroom. It is one of the abiding legacies of the period of the British Government. We should not disdain or forget our debt to that period.

The Senior Counsel in India are called Senior Advocates. They wear the same gown as you do, that is silk, with a square back. They have a special relationship with the Court. They are trusted by the Court. They are, in the words of Chief Justice Brennan, the ministers of justice who, with the Court, fashion the legal principles under which we all live.

When I go to Cambodia for the United Nations I see a contrast in the legal system of that land from the system which India, Australia and other countries of the Commonwealth enjoy. The biggest contrast is seen here in this courtroom today. We choose the leaders of our profession, and in most cases, the Judges, from the senior members of the private Bar. They are not promoted in a public or governmental service. Those chosen have worked their lives in the private sector. Most have never worked as government employees until that moment when they receive a judicial commission. Even then they are not government servants. They are independent in law and in their attitudes. That is tremendously important. It is significant for the whole life of a barrister and ultimately, if they accept appointment, in life as a judge. It means that those chosen have never looked at government and never looked at bureaucrats as being part of their team. They have looked at them as something separate and different. It is a truly remarkable system of law which we inherited. It is institutionally designed, and regularly replenished, to uphold an independence of mind and of action. This is a major justification of our system of administering justice. We should never forget that. We should seek to explain and to justify its merits to fellow citizens who may not know its history and may not appreciate its purpose.

It now really falls on you, as the successors to 800 years of people who have gone before, including in ceremonies such as this, to carry on the high tradition. There is no doubt that, in your careers as leading counsel, you will see great changes. In this Court, changes have been proposed by Clarke JA who is in charge of our list. Something will have to give. We cannot maintain things quite as they are. The pressure on the few Judges is so great, the pressure on time is so pressing, the number of judges is limited. Therefore, in your professional careers as Senior Counsel, you will have an important role to play in, at the one time, maintaining the high standards which we have secured from the past and, at the same time, making sure that we are not part of the problem of unacceptable delay and cost.

I hope, as you go forth into your practice as Senior Counsel, that you will bear in mind the added responsibility which you have now assumed as leaders of the legal profession. You are leaders in society and not just in the courtroom. We send you out with a great deal of applause, with good wishes, with full hearts for your success and with great expectations. ❑

Legal Services Commissioner Confirms Direction of Office

The Office of the Legal Services Commissioner has now been in existence for almost 18 months. During that time we have established the office, hired our complement of staff (10), established a database, handled approximately 4,240 complaints against solicitors and 210 complaints against barristers while fielding 10,600 telephone inquiry calls and conducted 600 face to face interviews with complainants.

As most in the legal profession are now aware, we are the first port of call for all complaints against solicitors, barristers, licensed conveyancers and law clerks in NSW. When we receive complaints against legal practitioners, we firstly decide whether or not they should be declined as not amounting to complaints under the Act or as being frivolous or vexatious. For those complaints that are not declined, we decide whether or not we will deal with them or refer them to the appropriate Council for investigation. In general, we retain the complaints that are either politically sensitive or were lodged against individuals where investigation by the Council might cause a perception of conflict. The other class of complaints that we are likely to retain are those complaints which we believe could be resolved through formal or informal mediation between the parties.

It is also clear from the functions of the Commissioner in Section 131, Part 10 of the *Legal Profession Act* of 1987, that we have, along with the Professional Associations, an educational role. This is particularly the case as we have determined that the mission of the Office is to ultimately reduce the number of complaints received and handled by the Office against legal practitioners in New South Wales.

What many lawyers may not realise is that the model for regulation of the profession that we have adopted in NSW in unique in the world. What we have is a form of co-regulation with my Office working with the two Councils to regulate both branches of the profession. No other jurisdiction I'm aware of in the world has a similar model, although a Legal Services Ombudsman does exist in the UK, albeit with different and more limited powers than ours. Other Australian jurisdictions are presently considering moving to our model of co-regulation.

As this Office has no direct precedent in Australia it was decided that it would be very valuable for me to travel to the UK and the United States in September of this year to explore mechanisms used to set both ethical and practice standards for the profession, as well as the complaint handling procedures to deal with those who fail to meet such standards.

While a full and detailed report is being prepared concerning what I learned on this trip (incorporating information from many interviews and extractions from volumes of reports and papers I collected), I intend here to give a quick overview of my impressions and findings.

Amidst a flurry of meetings, speeches and seminars, I attended several conferences. One of them was the UIA Annual Conference held at the Grosvenor Hotel in London which was also well attended by members of the NSW Bar Association. Attending this conference were 1200 lawyers from 60 different countries discussing a number of issues under the general theme of "Meeting the Challenge". On the first day of the conference there was a panel discussion on entrance to the profession. This had a number of key speakers from various Law Societies and Bar Associations. Unfortunately, the main subject covered by virtually every speaker was the fact that there are presently too many lawyers. In itself, this choice of subject matter is not surprising. However, I was very disappointed with the level of discussion about the issue. There did not seem to be any analysis of what should be done, or indeed, what power the legal profession could utilise to impact on the issue at all. Indeed, it seems to me that rather than focussing on the question of "too many lawyers", the more appropriate issue to address is to ensure that lawyers are competent and of high ethical standards, rather than simply a question of numbers.

While in London I met with the executives of the Law Society and Bar Association as well as those involved with the handling of complaints and the setting of ethical standards. I must admit that I came away with a feeling that, notwithstanding some very positive initiatives such as the client care rule which applies to solicitors' practice, the profession in the UK experiences a deeper division between the branches of the profession than here in NSW and is also less focussed on the needs and rights of the consumer of legal services.

Following my week in London, I flew to the United States where I held meetings in New York, Chicago, San Francisco and Los Angeles with the American Bar Association and a number of lawyers involved in the disciplinary area as well as legal academics and many individual practitioners.

Not surprisingly, the system of discipline which applies to the profession in the United States is markedly different from that that exists in the UK or here. In America, due to their strong focus on separation of powers, the disciplinary function in relation to the legal profession exists as a branch of the judiciary. The disciplinary committees are actually

"employed" by the state court system.

The American Bar Association, which is a voluntary organisation, puts out model rules which are in turn adopted by the State Bar Associations and then presented to the judiciary for their adoption.

The codes established and adopted are, like much legislation in the United States, highly detailed and codified. Accordingly, much of the process of complaint handling and discipline is based on what may be referred to as technical arguments over the application of the various codified rules. In this process, the complainant or consumer of legal services has very little, if any, role to play. They simply lodge their complaint and the resultant disciplinary hearing is largely conducted by affidavit.

The major concern that this gives rise to is that the consumer's problem is never addressed, causing a greater degree of consumer dissatisfaction with the legal profession.

This, coupled with the fact that America has just hit the milestone of 1 million practising lawyers (one for every 260 members of the population), and what can only be described as bizarre advertising campaigns by members of the profession, has resulted in an even greater crisis of confidence in the community with the legal profession than exists in Australia.

I returned to Australia with a very strong view that the direction that we have taken in the regulation of the profession is the right direction. While we still have many bugs in the system, and unacceptable delays, particularly in our review function, the underlying philosophy of positively addressing the 95% of complaints that would never result in discipline of a practitioner through mediation and other forms of resolution is far more beneficial to the community and ultimately for the profession. As Commissioner I strongly support the initiative of the Bar Association and the Law Society in focussing not only on the disciplining of aberrant legal practitioners through the complaint handling process but on the resolution of the problem presented by the complainant. It is through mediation and resolution of these problems that the profession will not only gain a greater degree of satisfaction in its clients (and resultant reduction in "lawyer jokes"), but will also gain positive insight into how to better focus the service provided to clients.

While many in the profession have expressed to me their concern about increased government regulation, increased competition caused by an explosion in the number of legal practitioners, and a shrinking financial base, I believe that all is not doom and gloom for the profession.

Unlike what I experienced in the UK and the US, here we are better recognising the importance of consumer satisfaction when providing legal professional services to the community. It is through this approach, and not that of increased barriers to complainants, or defensiveness in the face of government regulation, that will ultimately provide the degree of respect, understanding and satisfaction by the community of the legal profession that the profession deserves.

❑ Steve Mark

Justice Kirby elected President of ICJ

The President of the Court of Appeal, Justice Michael Kirby, was elected President of the International Commission of Jurists (ICJ) at the Commission's triennial meeting in Bangalore, India on 27 October 1995.

For the past three years Justice Kirby had served as Chairman of the Executive Committee of the ICJ, the main executive office in the organisation.

The ICJ comprises no more than 45 jurists elected by the present Commissioners to reflect the legal profession around the world.

The Commissioners come from different branches of legal activity and different regions of the world. The activities of the ICJ are focussed on defence of the rule of law, advancement of human rights and protection of the independence of the judiciary and of lawyers.

One of the recently elected ICJ Commissioners is Dato' Param Cumaraswamy (Malaysia) who, in 1994, was appointed UN Special Rapporteur on the Independence of the Judiciary and of Lawyers.

Justice Kirby holds the UN post of Special Representative of the Secretary-General for Human Rights in Cambodia.

Justice Kirby will hold the post of President of the ICJ for three years. His immediate predecessor as President was Dr Joaquin Ruiz-Giminez, the former Ombudsman of Spain who was a defender of human rights in that country during the Franco years.

Justice Kirby told the closing session of the joint meeting of ICJ Commissioners and the 100 representatives of National ICJ Sections and Affiliated Organisations from around the world that he had adopted objectives of modernising the ICJ organisation.

This had involved securing the participation in the Commission of more women as Members, more non-English speaking Commissioners, more representatives from developing countries and more younger lawyers.

The ICJ had, in the past three years, acquired new premises in Geneva and had adopted a much more transparent administrative style than it had followed in the past.

Lawyers in Australia wishing to be associated with the AICJ should contact the Secretary-General of the Australian Section, Mr David Bitel, Sydney (telephone (02) 283 1333: Fax (02) 267 8808). Those interested will then be put in touch with their local branch.

The AICJ has been very active in recent years with regard to concerns relevant to the independence of the judiciary in Australia and with trial and electoral observance and the conduct of human rights missions in the region, including in East Timor, Burma, the Philippines and Japan.

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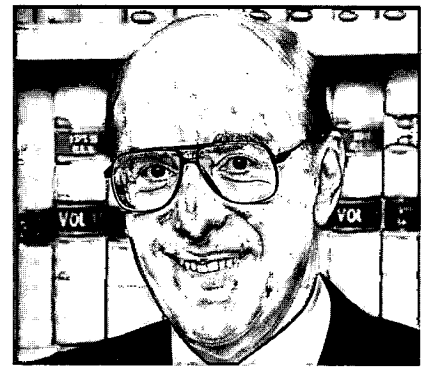
Highlights of 1995

Snippets from the year's ceremonial and other occasions.

January and February saw the appointment of three new Supreme Court Judges.



Mr Justice Simos

January

On 31 January Mr. Justice Simos was sworn in. His remarks set the Bar off on a steady course for 1995:
"The Bar is a unique and special institution in our present day society. Its long tradition of integrity, and of fearless and independent advocacy and of the pursuit of excellence has served and continues to serve the community well. As an institution it is presently adapting successfully to great change without sacrificing its essential traditions and character, more particularly under the leadership of the Bar Council and its President, Mr. Tobias."

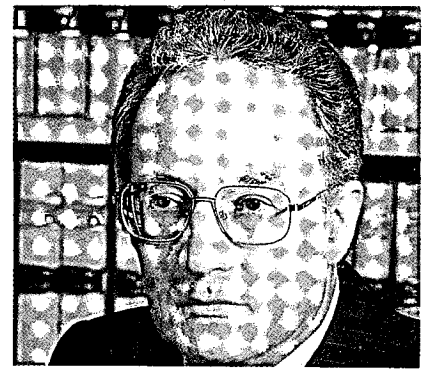
February

Mr Justice Bainton

On 20 February Mr. Justice Bainton took office. He drew attention to the vicissitudes of the barrister's life, pointing out that, in his career as a barrister, he had "had the good luck to have a wife who has put up with somebody working long hours, coming home late, being away for days at a time, weeks. She has put up with that with unflagging cheerfulness. Without it, I am sure I could not have done what I have managed to do."

Finally, on 27 February, Mr. Justice Sperling was sworn in. He blessed the Bar in his speech with an insight to his success:
"When I took silk I decided I would always insist on a junior who was brighter than me. Anything else would be a lost opportunity. I rapidly found that it was unnecessary to make this known; it seemed to happen automatically. Pride has prevented me from wondering why."

March



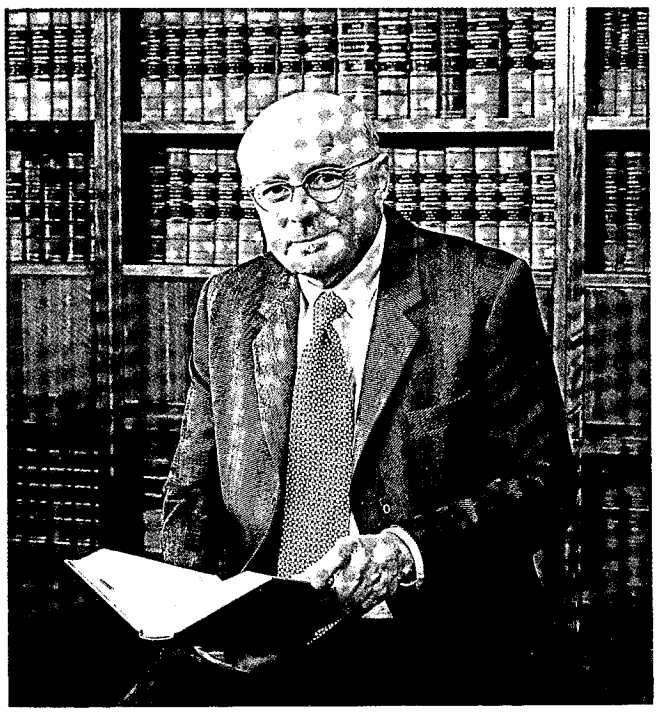
Mr Justice Sperling

In March the Labor Party squeaked into power and we had a new Attorney General, the Honourable J.W. Shaw QC, MLC, who was welcomed at a function in the Bar Association on 12 May 1995. McCarthy QC spoke of the difficulties of the new Attorney's role in politics:
"None of us underestimates the difficulties and pitfalls for lawyers in politics, particularly at Cabinet level. To defend legal principle and prevent injustice when the public is frustrated and angry is never easy. It requires courage, patience and wisdom. Demagogic lawyer bashing can be dangerous and destructive. It must be resisted - just as political action motivated by personal animosities must be resisted. Parliament must never, in law and justice, yield to the temptation to throw out the baby with the bath water. No-one is better fitted to make the case for justice and common sense than yourself. We wish you every success."

April

There were changes on the High Court. Sir Anthony Mason AC, KBE, retired as Chief Justice on 20 April. In his farewell speech he said: "As you have heard, I have been a member of this Court for almost 23 years and that amounts to half my working life. It has been a great experience. Indeed, I cannot imagine anything else that would have given me as much satisfaction. From my very early days, it was my ambition to become a barrister and at no stage did it ever occur to me that I might take up any other career. Curiously enough, one of the attractions of the Law, as I saw it in my younger days, was that it offered all the certainty of mathematics as a discipline, a view from which I was later forced to retreat when, as a law student, I began to study Constitutional Law and I became acquainted with the old learning on section 92 of the Constitution."

Chief Justice Brennan AC, KBE



Mr Justice Gummow

On 21 April the Honourable Sir Francis Gerard Brennan A.C., K.B.E. was sworn in as Chief Justice and on the same day the Honourable William Montague Charles Gummow was sworn in as a Justice of the High Court.
Speaking after he had been sworn in, Chief Justice Brennan said:
"... this Court is not a parliament of policy; it is a court of law. Judicial method is not concerned with the ephemeral opinions of the community. The law is most needed when it stands against popular attitudes, sometimes engendered by those with power, and when it protects the unpopular against the clamour of the multitude. The judicial method is concerned with the equal dignity of every person, his or her capacity to participate in the life of the community, to contribute to society and to share in its benefit; it is concerned with the powers entrusted to governments and the manner in which those powers are exercised. Judicial method starts with an understanding of the existing rules; it seeks to perceive the principle that underlies them and, at a deeper level, the values that underlie the principle. At the appellate level, analogy and experience, as well as logic, have a part to play. Judgments must be principled, reasoned and objective ... And, most significantly, each step in the reasoning must be exposed for public examination and criticism.

... The public interest in the judgments of this and other courts is a clear and gratifying indication that, in this country, we are governed by the rule of law. The courts have earned and maintained public confidence by their unfailing response to every reasonable application, by their impartiality and the fearless administration of the law. Today's focus is on the work of the High Court, but it must be remembered that the face of justice is more often the face of the magistrate and the judge at trial."

Mr. Justice Gummow remarked: "I should not conclude without saying how happy I am that Sir Anthony Mason and Lady Mason are here today. Three points should be made at least.

First, in 1976 when I was considering coming to the Bar it was to Sir Anthony that I turned. I did so for what I knew would be measured advice. This was given. Characteristically, the advice was not extravagantly enthusiastic. But then Sir Anthony paused and said, 'Well, I was cautious on a similar occasion with one Murray Gleeson, and Gleeson now seems to be getting on well enought'. So I took some heart. Secondly, it was Mr. Mason, with Mr. Meagher and Mr. Hutley who brought equity to life at the Sydney Law School. For the common law, that had already been done by Professor Morison.

The third point is related to the second. It is that Sir Anthony must be the only Chief Justice of any superior court in the common law world who has relinquished office with two of his former pupils seated next to each other on that Bench. And, as I have been discussing with Justice Gaudron, both of them from the same year of lectures."

On 23 April Tobias QC publicly apologised for his comments about whether women use "feminine wiles" to advance their careers, acknowledging them to be a serious error and an insult to women generally (The Australian, 23/4/95).

Bench and Bar Dinner - May 1995

Sir Anthony addresses the assembled masses.

(l to r) Susan Crennan QC, President of the Australian Bar Association, Chief Justice Gleeson AC, Murray Tobias QC.

May

May was a busy month. On 8 May the Honourable Justice G.F. Fitzgerald, AC, Chief Justice of Queensland, gave a graduation speech in which he remarked on the process of judicial selection:

"Both the judicial responsibility to produce a unique Australian jurisprudence and the values and policy choices involved in judicial decisions draw attention to the narrow social group from which judges - especially High Court and other appellate judges - are drawn. While judges represent the community as a whole, and do not, and should not, represent any section of the community, it is a legitimate criticism that the judiciary is drawn from an extremely narrow group and hence its opinions and perspectives on contemporary community values and attitudes are distorted and limited.

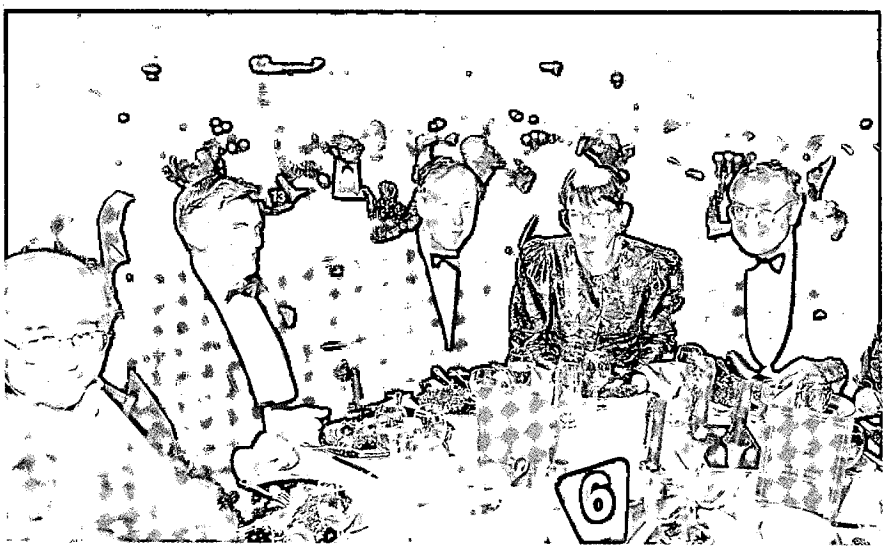
The conventional response to any discussion of judicial appointments is that merit must be the sole criterion. On the assumption that factors such as politics, religion, progressive or conservative social views, and personal or regional allegiances are immaterial, it is difficult to see what other position could be adopted. However, while capacity to perform judicial duties, integrity, etcetera, must determine who is eligible to be appointed to the bench, merit is a surprisingly slippery and subjective consideration and sometimes merely a code-word for membership of the extremely conservative legal establishment. The opposition which the late Justice Lionel Murphy attracted on his appointment to the High Court was not related to the difficulties he experienced towards the end of his life but to the establishment perception that he lacked the necessary legal ability or "merit". In retrospect, he has been one of the most important members of the High Court in the last 25 years; some other High Court judges in that period who were acknowledged legal technicians have already been almost forgotten.

Further, the definition of merit is critically dependent on one's perception of what makes a good judge: most lawyers would agree that it is necessary for a judge to understand the overall structure of the common law, know or be able to ascertain and comprehend the detailed rules formulated by other judges, and reason by processes of inductive and deductive logic to conclusions suitable for the decision of particular disputes, such a course exposes a judicial decision-maker to the experience and wisdom manifest in prior decisions, and many consider that that exhausts the judicial function. Others, myself included, consider that such an approach also perpetuates any errors, injustices or conflicts with modern Australian values which prior decisions involve, and that it is essential to constantly test current principles against the ideal of justice.

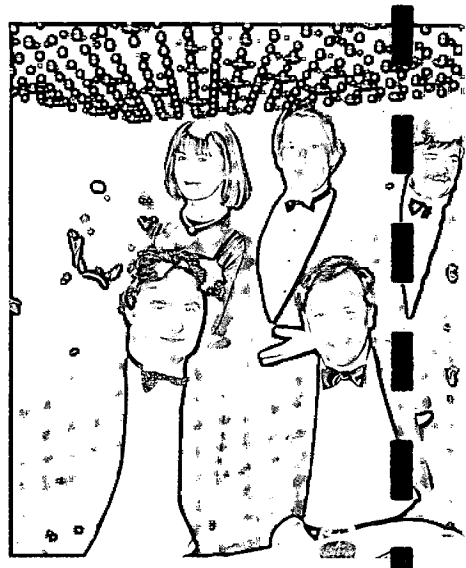
Of course, justice is not a mono-dimensional concept, concerned only with the rights and obligations of the immediate parties before the court. Other factors, such as certainty and predictability in the law and the potential effect of a decision upon other persons, must also be considered.

It is in both the community's and the judiciary's interests that there be greater acceptance of the reality of judicial power and of the importance of judicial appointments. Community support for the fundamental doctrine of judicial independence requires that the judiciary not exhaust its "political capital" but maintain public confidence. Judges, especially appellate judges, influence the development of the law and through it society, by either maintaining the status quo or contributing to a fairer society, and so helping to empower those who are disadvantaged. Both the community and the judiciary need to openly acknowledge that, as Professor Martha Minow put it in "Justice Engendered" (1987) Harvard Law Review, 10 at p 93, "The judiciary [is] a critical arena for demands of

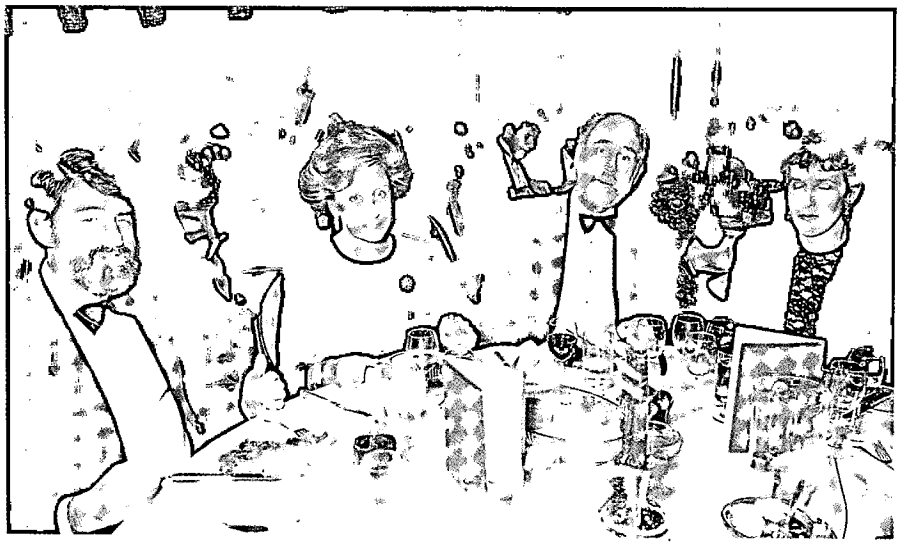
Bench and Bar Dinner



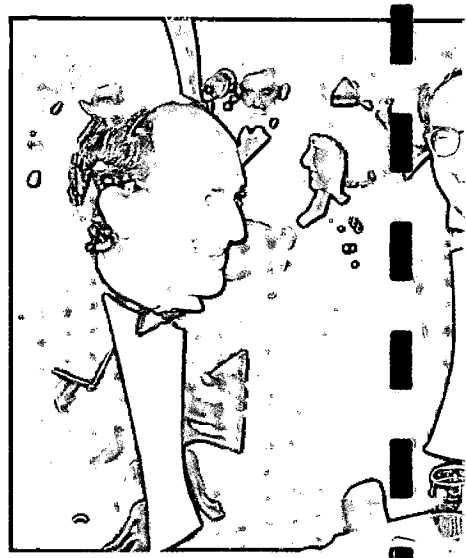
(l to r) Ian Barker QC, Justice McLelland, Prof Michael Chesterman, Justice Mathews, John McCarthy QC



(l to r) (top row) Madeleine Gilmour, [illegible]ennis Malcolm Gracie bottom row) Thos Hodg



(l to r) Nick Cowdery QC, Trish Kavanagh, Acting Justice Barr, Anna Katzmann



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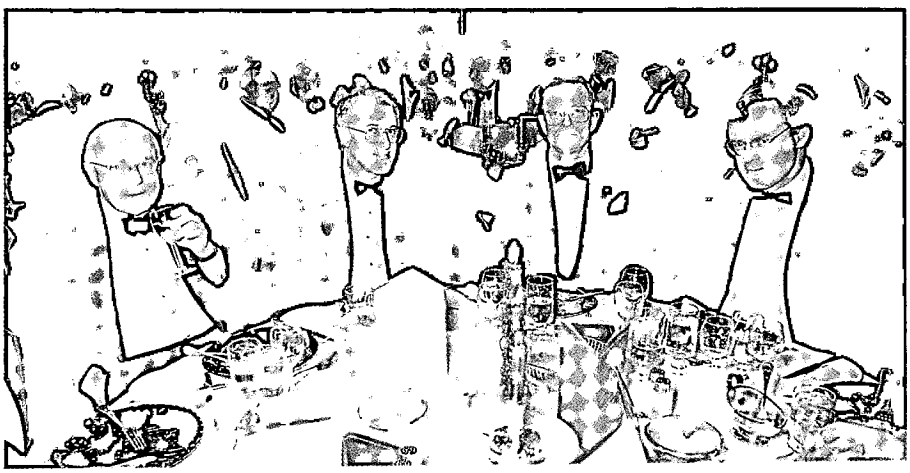

(l to r) Justice Gummow, Keith Mason QC, Justice Handley, Tony Meagher SC

(l to r) Babette Smith, Ch[illegible] David Jacks[illegible] QC

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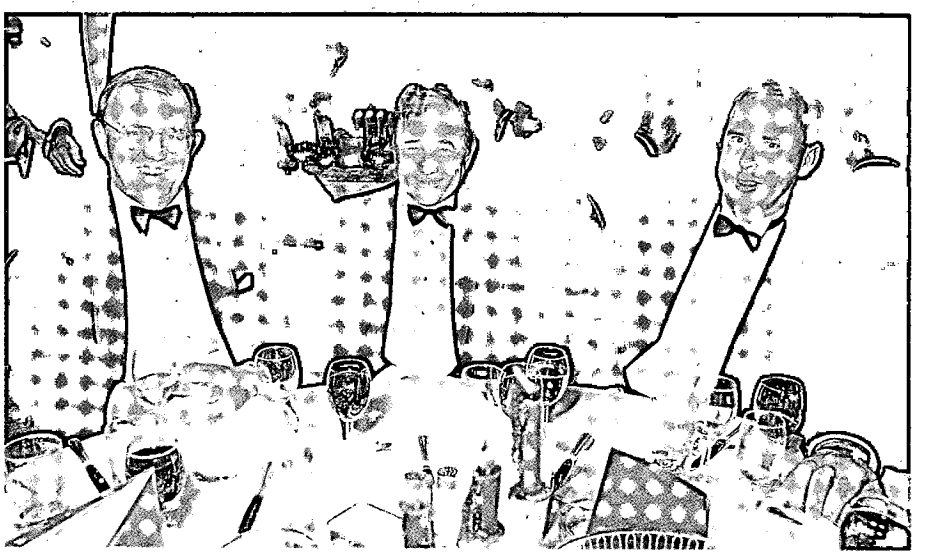
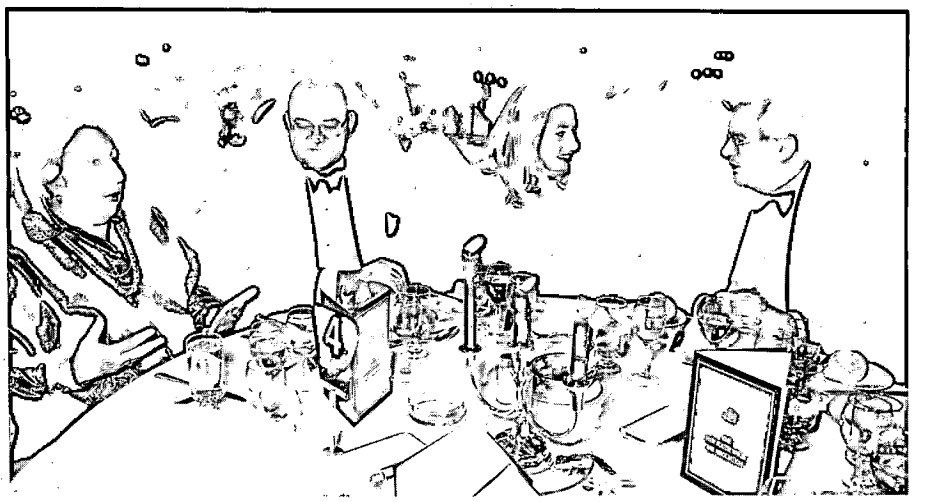
on, Peter King, Chris Hoy, Richard Bell

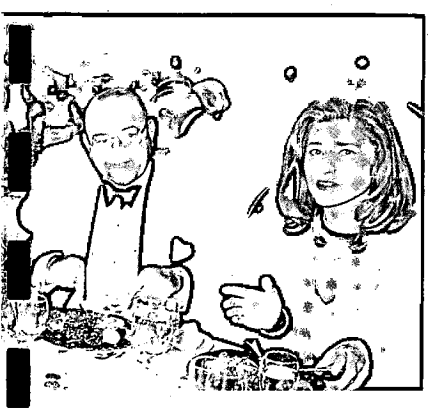


(l to r) Larry King SC, Roger Gyles QC, Brett Shields

gh, Richard McHugh



(l to r) Chief Judge Pearlman AM, David Jackson QC, Chrissa Loukas, Attorney-General Jeff Shaw QC



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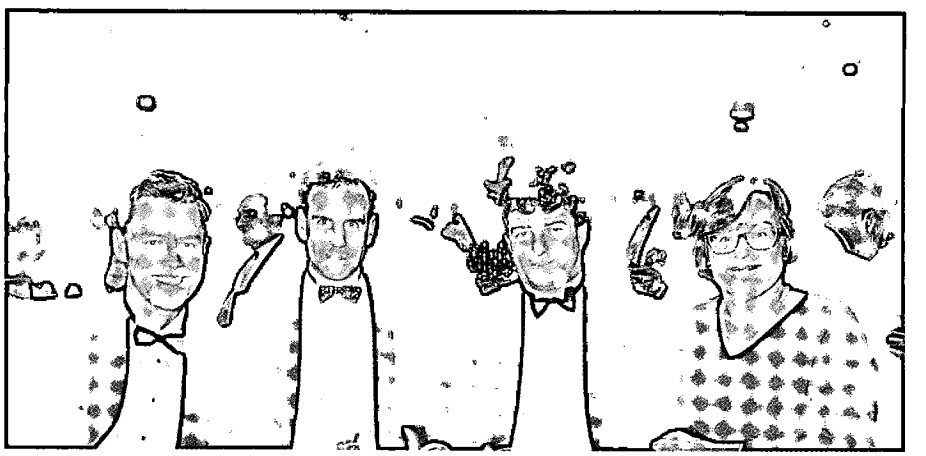


(l to r) David O'Dowd, Fabian Gleeson, Gary Coleman, Paddy Bergin

Bench and Bar Dinner - May 1995

(l to r) Stephen Gageler, Robert Macfarlan QC, Justice Beazley

(l to r) Malcolm Holmes QC, David Pritchard, Andrew Bell - the secret handshake?

Brian Skinner and Stephen Odgers

(l to r) Chester Porter QC, John Coombs QC, Rodney Parker QC

inclusion". Those who are unrepresented or under-represented in the judiciary are entitled to insist that judges at least understand their concerns and take their perspectives into account."

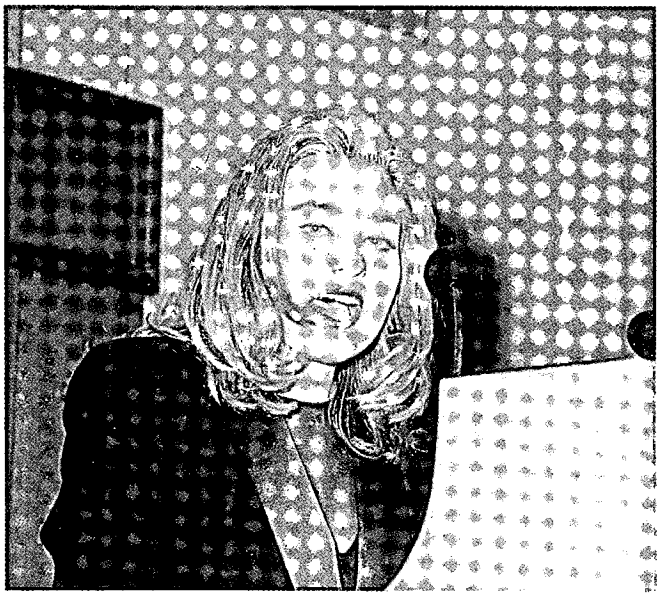
The 1995 Bench and Bar Dinner took place on 26 May*. Sir Anthony Mason AC, KBE was the guest of honour. Jackson QC was Mr. Senior. In the course of his speech, in remarking on Sir Anthony's career, he referred to two early cases in which Sir Anthony appeared as Ken Asprey QC's junior: "The second case held illegal and void a loan by a company to assist the purchase of its own shares. The Asprey-Mason team was again entirely unencumbered by merit, and was again successful.

"The latter case ... had two enduring effects. One relates purely to the law ... the second derives from the name of the case, *Dressy Frocks Pty Limited -v- Bock.* It is a consequence of the "cab rank" rule that one cannot choose one's cases - much less their names - but the name "Dressy Frocks" is really awful, simpering and Liberace-like - like living at "Beauty Point". And I have wondered whether it was the memory of that case which inspired the alacrity with which the High Court, on his taking office as Chief Justice, abandoned wigs and gowns and adopted instead the present severe garb, the distressed Christian Brothers look.

* The video is available from the Bar Association Library.

Many of us felt some sympathy for the High Court Justices when they decided to change from the former wig and gown. Judges' salaries, even on the High Court, are not high. And it was thought that the flooding of the wig market might depress the prices they would otherwise have received for these quite expensive items. But, by a remarkable coincidence, the much more numerous Family Court, on almost the same day, decided to take up wearing wigs and gowns. The seven Justices of the High Court had no trouble disposing of their wigs, all 35 of them."

Ms. Junior, Chrissa Loukas, noted:
"Sir Anthony Mason in a judicial career spanning some 26 years, has managed not to give any offence in the gender department. Some may wonder how our guest of honour has found it so easy. I know our President, resplendent, tantalising even in his masculine wiles, is wondering."



Chrissa Loukas

Sir Anthony described the ephemeral nature of both the commencement of his career and its conclusion:

"My career has ended in much the same way as it began as an image in the floating world. I started at the Bar as a floater on the top floor of the old Denman Chambers. Later I moved into the subterranean basement of that building and then I floated again to the surface in the caretaker's bathroom on the top floor. By the time I arrived there the bar had been removed. Presently I float between the 18th and 19th levels of the Law Courts building, spending most of my time in a room that is described as the visiting Registrar's room on the 18th level. I had visions of a more glorious dénouement to my judicial career: a grass roots movement calling for an amendment to section 72 of the Constitution enabling me to continue on as Chief Justice after I reached the age of 70. I even contemplated commencing an action in the High Court seeking a declaration that my old commission which carried an appointment for life was not impliedly revoked by my subsequent appointment as Chief Justice, and I might say that argument has as much going for it as a number of arguments that have succeeded in the High Court over my dissent. The argument, if successful, would have entailed the invalidity of Mr. Justice Gummow's appointment and involved his ignominious relocation back to the Federal Court, but I was moved by more gentlemanly instincts."

Sir Anthony Mason AC, KBE

June

In June the Bar Council passed a resolution condemning all forms of sex harassment, discrimination on the grounds of sex or sexual preference and sexist behaviour of any kind and noted that such conduct may be held to be professional misconduct or unsatisfactory professional conduct within the meaning of the Legal Profession Act 1987 as amended.

July

In July the Bar Association published the results of a survey conducted of women barristers which disclosed that unwelcome sexual advances and comments from barristers (59%) and solicitors (39%) had been experienced, mostly while the respondents were at the Bar. The survey had been prompted by the release of a NSW Government report of

Gender Bias and the Law which identified discriminatory practices across the legal profession. Both the Bar Association and the Law Society of New South Wales are continuing to pursue strategies to improve the situation. The matter is also being considered by the Law Council of Australia.

There was then a quiet period until October.

October

On 4 October the Hon. Justice Madgwick was sworn in as a Justice of both the Federal Court and the Industrial Relations Court of Australia.

On 9 October the Hon. Justice J.R. Lehane was sworn in as a judge of the Federal Court.

On the 16th, Peter Hidden Q.C. was sworn in as a judge of the Supreme Court. In his speech, he referred to his time as a Public Defender as being undoubtedly the most satisfying period of his professional life. "There I had access to serious trial and appellate work which would rarely have been available to me in private practice. I enjoyed the friendship and support of colleagues on the floor who, between them, possessed an unrivalled mastery of the criminal law, and I had the benefit of a high standard of instruction from the in-house solicitors of the Legal Aid Commission and a number of dedicated private solicitors who accepted Legal Aid work on assignment from the Commission. ... I was gratified to read in the judgments of this Court in the Milat stay application, both at first instance and on appeal, a public acknowledgement of the high standard of representation in criminal matters afforded by the Public Defenders and the solicitors of the Legal Aid Commission."

November

The Hon. Sir William Deane A.C., K.B.E. retired from the High Court on 10 November 1995 to take up his position as Governor-General of Australia when the incumbent's term of office concludes.

His successor has not been announced. All likely candidates are deflecting subtle and not-so-subtle cross-examination on their prospects in suitably po-faced manner.

December

A new President, a new Bar Council.

1996 looms.

It all starts again... or continues? ...

Mr Justice Hidden

Sir William Deane AC, KBE

Centenary of the Commercial Court in London

On 2 October 1995 a dinner was held at the Guildhall in London to mark the centenary of the Commercial Court. The booklet, which included the menu and toasts, also contained some fascinating background to the Court as well as observations on its current operations.

Sir Thomas Bingham, Master of the Rolls

"On 1 December 1663, after dinner, Samuel Pepys dropped into the Court of King's Bench, sitting here in Guildhall. The case was concerned with a policy of marine insurance. It was a great occasion.

The Lord Chief Justice was presiding, and as Pepys recorded, *"there was all the great counsel in the kingdom in the case"*.

Pepys was more amused than impressed, *"but it was pleasant"*, he wrote, *"to see what sort of mad sort of testimonies the seamen did give, and could not be got to speak in order, and their terms such as the judge could not understand, and to hear how sillily the counsel and judge would speak as to the terms necessary in the matter would make one laugh."*

Were he to return today, he would find that all had changed, except, regrettably, the attire of the Judges, and changed, unusually nowadays, for the better. He would find the incoming cargo of cases neatly stowed on the tanktop under the superintendence of a master stevedore, and discharged through six or even seven hatches each weatherworking day, Saturdays, Sundays and holidays excluded unless used, by a team of Judges, Counsel and Solicitors in way of Court 10 and elsewhere who, if not always afloat, are safely aground.

To Judges and Practitioners of this experience the terms necessary in the matter are the current coin of everyday converse. They need not be told that NCAD stands for "notice of cancellation at anniversary date" or that HSSC stands for "heat, sweat and spontaneous combustion", apparently random aggregations of initials such as FC&S, PPI, RITC, FPA, are as intelligible to them as FOB and CIF to the man on the Docklands Light Railway. They are as familiar with bottomry bonds as with Euro bonds, bale bonds and performance bonds; with letters of mart and countermart as with letters of intent. They can distinguish at a glance between a beam and an intercostal, an angle bar and a z-bar frame, a strake and a stringer. They are no strangers to inherent vice.

In a Court such as this it comes as no surprise that more despatch is earned than demurrage paid. In some respects the world of maritime commerce does not change. The Lloyd's SG Policy continues to make reference to pirates, rovers and thieves. It remains the case, as Defoe observed in 1702, that:

> *"some fit-out ships and double freights ensure,*
> *And burn the ships, to make the voyage secure.*
> *Promiscuous plunders through the world commit,*
> *And with the money buy their safe retreat."*

Those with experience of Scuttling cases might also be inclined to question Shakespeare's optimistic view that:

> *"When the sea was calm, all boats alike showed mastership in floating."*

That is to underrate the nautical skills of the second engineer.

The mission of the Court has been to apply principles and practices worked out long ago to the rapidly changing problems of modern commerce, insurance and finance, developing new principles and practices to meet new needs.

The history of the Commercial Court over the past century has not been one of steady advance.

In the 1950s it almost wasted away. Despite the availability of two Judges of outstanding eminence, business was reduced to a trickle.

In 1957 fifteen actions only were tried. There followed a remarkable revival.

In recent years some four hundred cases or so have been set down in a year and well over a hundred have been the subject of substantial full-blown trials in such a period, in addition to numerous applications.

To this revival many contributed, some of the most important and distinguished contributors being present today.

I shall mention no names, save one, that of Mr David Bird, who has served the Courts as Clerk since 1977, bringing to his Office a degree of loyalty, dedication and discreet wisdom which it would be hard to match in the court service or any other service, public or private.

The Judges of the Commercial Court set out on their task with many inestimable assets.

A commercial and maritime tradition going back without interruption to Mediaeval times; an inherited inclination to test principles on the workbench of practical experience; a complete absence of Nationalistic bias; the assistance of an intelligent, energetic and progressively minded Bar; the services of highly specialised, highly expert and highly professional solicitors; the experience and expertise of owners and charterers, classification societies and P & I clubs, marine surveyors and naval architects, pilots and average adjusters, underwriters and brokers, bankers and stockbrokers, commodity dealers and trade associations, arbitrators and all who make up the commercial community; and the generous recognition and support given to the Court here in the heart of the City by the Lord Mayor and Corporation of the City of London.

It is appropriate on this Centenary to count our blessings and look back on the past with gratitude and a measure of pride, but it would be fatal to stop there. The world of commercial litigation is a competitive place, it owes no living to the Commercial Court in London: gains hardly made cannot be taken for granted. We must never forget that some of the major ambitions which inspired the Founders of this Court a century ago remain largely unfulfilled and as elusive as ever."

The Birth of the Commercial Court

Mr Justice Mathew heard the first "commercial case" on Friday 1 March, 1895. He gave directions for the trial of a dispute between Flemish cloth manufacturers and their London agent. This birthday of the Commercial Court followed upon the memorandum of the judges of the Queen's Bench Division, issued by the Lord Chief Justice, Lord Russell, in February 1895, that there should be a Commercial List for London cases arising from the transactions of traders and merchants in the City of London.

Over the next hundred years, this judicial initiative has proved to be one of the most successful and enduring judicial experiments, implemented without legislation or governmental assistance, to the enormous benefit of the City of London and the international commercial community trading through London. As with subsequent commercial judges, Mr Justice Mathew brought to the bench a wealth of practical experience as a senior and successful practitioner in the field of commercial law. Such commercial judges did not require indoctrination in the general principle of commercial law and practice; and commercial disputes could be heard and decided quickly and effectively.

It had not always been so before 1895. Indeed, the "True Begetter" of the Commercial Court was said to have been Mr Justice Lawrance. He was an honest gentleman, popular and respected, eventually, as a criminal judge; but he knew little of commercial law and practice. Nonetheless, in May 1891, Mr Justice Lawrance was required to try in the High Court a complicated dispute over a general average statement by adjusters in the City of London: *Rose v Bank of Australasia.* By all accounts, the judge's conduct of the trial was at least unfortunate and the judgment was much delayed, its text bearing little evidence of great study or scholarship. Although on appeal the result was later upheld by the House of Lords, it is possible that in the circumstances Mr Justice Lawrance's correct conclusion was no more than accidental.

In the account of MacKinnon LJ, it was evident to those attending the trial that Mr Justice Lawrance *"knew as much about the principles of general average as a Hindoo about figure skating. He listened with a semblance of interest to Cohen and Corell Barnes, reserved judgment and forgot all about the case. After a long delay he was somehow reminded that he ought to give judgment."* Arthur Cohen QC, one of the greatest lawyers of his time, and Gorell Barnes QC, later Lord Gorell, were the leaders for the parties, whilst the juniors were T E Scrutton and Joseph Walton. It was Scrutton who recorded the City's outrage over Mr Justice Lawrance:

> *"What is this system you are offering us? Let us have Judges who understand our disputes. We have no desire to bring our cases on as a means of educating people who have never heard of the matters involved before."*

Within four years, the "Commercial Court" was in place; and it was Scrutton who duly anointed Mr Justice Lawrance as the "True Begetter" of the Commercial Court. Mr Justice Mathew was followed by many distinguished Commercial Judges, not least Scrutton himself in 1910; and from 1916 in the Court of Appeal. Scrutton's father was a shipowner; at the Bar he acquired an enormous practice in commercial law; and he also produced lasting works on the law of shipping and copyright. It was said of him as a judge that he was *"appallingly learned in the law and in the tortuosities of its application to commercial life ..., as to shipping law he is a walking encyclopaedia."* Tall and stoutly built, with an imposing beard, Scrutton was the embodiment of the close relationship between the Commercial Court and commercial men, which continues to the present day. ❑

Mr V V Veeder QC

The Commercial Court

The Commercial Court, as presently constituted, consists of 10 judges of the Queens Bench Division of the High Court, of whom 5 or 6 sit in London at any one time to hear cases commenced in or transferred to the court on the grounds that they are of a specialist commercial nature.

Historically, the Court has particularly specialised in resolving shipping disputes arising out of Charterparties and Bills of Lading, with three other major areas of activity: Insurance and Reinsurance, Banking and International Sale of Goods. Parties also bring disputes arising out of Agency and Distributorship contracts, Joint Trading ventures and Carriage by Land and Air. Statute also assigns to the Court limited supervisory powers in respect of arbitration disputes.

The commercial judges are appointed from practitioners at the Bar, experienced in commercial matters. Their knowledge of the relevant law and market background is attractive to commercial litigants, who are largely represented by a relatively small number of firms of solicitors and barristers from chambers expert in commercial litigation. Some lay clients who are repeatedly involved in litigation before the Court, notably the ship owners' P and I clubs, several of the major insurance companies and Lloyd's syndicates, various banks and major participants in international oil, feedstuffs and other commodity contracts, take an active interest in the work of the Court and are represented on the Commercial Court Users Committee. This committee (with commercial judges and appellate judges among its members) holds several meetings a year under the chairmanship of the Judge in Charge of the Commercial List, with the Department of Trade and Industry and Lord Chancellor's Department also represented. Such meetings make a significant contribution to maintaining good public relations with the users and a ready understanding of their needs and difficulties.

The Court's special procedures for case management and prompt disposal of cases are set out in the "Commercial Court Guide" (now in its 3rd edition) which, within the general Rules of Court, has for some years now set the pace in adapting and improving general court procedures.

Over half of the cases commenced in the Court involve foreign litigants on *both* sides. There are three main reasons

for this. First, the location in London of various markets and exchanges which provide for litigation or arbitration of disputes in London; second, the worldwide incorporation into marine and other commercial contracts of English law and Jurisdiction clauses; and the attractions of the Commercial Court, applying English law and procedures as a forum for litigation. As such, the Commercial Court serves not only the City of London but the world's commercial community and it is proud to do so.

With the City retaining its position in world markets and the recent strides made in computerisation and electronic communication, the demand for the Court's services is likely to increase. Already the emphasis of its work is less predominantly maritime and increasingly concerned with the insurance, banking and regulatory fields which, in turn, throw up ever "heavier" cases.

With its recent increase in manpower, the Court has responded to this challenge and is able to provide trial dates acceptable to those who seek its services. The Court intends to continue to satisfy the demands upon it, adapting its procedures and improving its techniques of case management in order to rise to any further challenges which the next hundred years present. ❑ The Honourable Mr Justice Potter

Newton's First Law

During submissions in a claim for compensation where the plaintiff had fallen from the first floor of a construction site and was seeking damages on the basis, inter alia, of the builder's breach of a regulation under the *Construction Safety Act* required fencing to be erected around any workplace which was more than 1.8 metres above the level below.

Watson: Your Honour, the plaintiff has not established any liability for breach of the *Construction Safety Act* regulations. The only evidence he gave was that he fell from the first level to the ground. He did not tender any evidence as to how far he fell and, your Honour cannot assume that he fell more than 1.8 metres. Your Honour would take judicial notice of the fact that, in some buildings, the first level is below the ground: Your Honour would be familiar with the Supreme Court where the first level is actually three storeys below the ground level.

Leslie AJ: So in you submission, the plaintiff fell up, did he? ❑

From the D.P.P.

No Bills

It seems to me that there are some misconceptions abroad about "no bills". It might be helpful for criminal practitioners to know what happens when a "no bill" application is made to the New South Wales DPP. It might also save some time and energy for my officers.

It is not a secret or mystical process. Section 7(2) of the *Director of Public Prosecutions Act* 1986 gives to me the functions, inter alia, of determining that no bill of indictment be found or that no further proceedings be taken against a person who has been committed for trial (or sentence).

An application may be made prior to committal proceedings or between committal and trial. Once an accused has been put in the charge of a jury I have no power to "no bill".

There may be more than one application in a matter. They are most commonly made by solicitors, although they are sometimes made by counsel or by unrepresented accused. They must be made in writing. Oral submissions (in person or by telephone) will not be acted upon. Statistics are kept on such applications and are published in the Office's Annual Report.

The procedure is straightforward. A letter addressed to the DPP identifying the matter and setting out the reasons why the proceedings should be discontinued (or perhaps a bill found for a different charge) is all that is required. The earlier in the prosecution process the application is made, the better.

In general: the letter goes to the solicitor handling the matter who writes a report and expresses a view. The file goes to a Crown Prosecutor who writes another report and makes a recommendation to me. The file then goes to a Deputy Director who makes a further recommendation to me. It may be considered by others along the way. It then comes to me for decision, which is final.

An application for discontinuance of proceedings made prior to committal for trial or sentence is dealt with as follows: the solicitor handling the matter writes a report and the application is usually determined by a Deputy Director or a Crown Prosecutor (if the matter is being handled by one of my regional offices, except where the matter involves a death).

There is no secret about what all these people are looking for. The questions being asked along the way are:

1. Is the evidence sufficient to establish each element of the offence? If not it will be directed that there be no further proceedings.
2. Can it be said that there is no reasonable prospect of conviction? If it can, then it will be directed that there be no further proceedings.
3. If that cannot be said, are there discretionary considerations such that it would not be in the public interest to continue the proceedings? (Such considerations are set out in the Prosecution Policy and Guidelines, a public document. It is presently being reviewed.)

Such tests are also applied when considering the appropriate charge/s.

Unless you consider that one of those questions can be answered in your client's favour, it will be a waste of time and of your client's money to make an application. You may assume that if a matter is proceeding at all, it has been carefully screened by a legal practitioner. Indeed, "no bill" applications are initiated frequently from within my Office.

I regard hopeless applications, one-paragraph requests (except in obvious cases) and repeated applications where there are no new considerations as a total waste of everybody's time, effort and money.

Legal and factual submissions on matters that may have the effect of weakening the Crown case should be included. If there is evidence in support of a defence, it should be put (preferably) in the form of a statutory declaration or expert's report and sent in. If you are not prepared to do that, your client might have to take his or her chances at trial.

I am not interested in clogging up our "Rolls Royce" system of criminal justice with hopeless cases. The community cannot afford it. I will always have to exercise judgment and if you can satisfy the tests described above on a rational basis, then the proceedings will be terminated. If you cannot, don't bother trying to bluff me or appealing to sympathy or irrationality.

Pleas of Guilty

There are two Crown Prosecutors appearing regularly in arraignment hearings in the District Court at the Downing Centre (for the time being, Alex Dalgleish QC and Terry Wolfe). When they appear in a matter they will be thoroughly familiar with it. If it is adjourned, they will stay in it.

Those Crown Prosecutors have wide discretion to accept pleas of guilty to the indictment or to appropriate alternative counts and will assist an accused to obtain all due credit for an early plea.

In that regard the role of sentence indications should be clearly understood. In *R v Hollis* (unreported, CCA, No. 60564/94, 3.3.95) Hunt CJ at CL said:

> "A plea of guilty entered after a sentence indication, however, should not be thought to disclose any such contrition at all. What an accused is saying when he seeks a sentence indication is that, unless I receive a sentence indication which is acceptable to me, I will plead not guilty and I will put the complainant [this being a sexual assault case] to that pain and embarrassment. That is no contrition at all. It is seeking a result which is expedient only to the accused himself."

Reference should also be made to the now reported cases of *Warfield* and *Glass* amongst others, the dicta in which have been drawn to the attention of - and are occasionally referred to by - the judges of the District Court.

I urge all Criminal practitioners to be familiar with their matters by the time they first come for arraignment. That is the time at which, if you talk to the Crown, you may be able to do the best for your client.

Judge Alone Trials

There has been a practice in the past of the Crown consenting almost as a matter of course to elections by accused to be tried by a judge alone under s. 32 of the *Criminal Procedure Act* 1986.

That practice has changed. I take the view that the requirement for consent by the prosecution under s.32(3) requires the question to be considered case by case and therefore it must be given or withheld on a basis that is informed, rational and directed towards the doing of justice.

To assist in preventing such decisions from becoming arbitrary I have furnished guidelines as to the giving of such consent.

Copies of the guidelines have been provided to professional bodies concerned and to the courts.

Paragraph 11 provides that in cases of uncertainty a prosecutor should refer the matter to a Deputy Senior Crown Prosecutor, the Senior Crown Prosecutor or my Chambers. That is not an invitation to the defence to "appeal" a prosecutor's decision to any of those named. The decision is ultimately made in the exercise of the prosecutor's discretion.

Evidence of Recollections under Hypnosis (and EMDR)

The Director of Public Prosecutions, has forwarded the following advice to the Commissioner of Police.

As a result of the NSW Court of Criminal Appeal's decision in *R v Tillot & Ors* on 1 September 1995 it has become essential that your investigators be aware of important procedural guidelines that should be complied with if the evidence of witnesses who have undergone either hypnosis or EMDR therapy for whatever purpose is to be admitted in court.

The guidelines for hypnosis, now also applicable to EMDR, are not in themselves laid down as a test of admissibility - or a requirement - but failure to comply with any of the following guidelines will give rise to a high probability that the court will decline to admit such evidence, whether proffered by the Crown or from a witness for the defence. My officers will have regard to the guidelines when determining whether or not such evidence should be tendered on behalf of the Crown.

1. The hypnotically induced evidence must be limited to matters which the witness has recalled and related prior to the hypnosis - referred to as "the original recollection". In other words, evidence will not be tendered by the Crown where its subject matter was recalled for the first time under hypnosis or thereafter. The effect of that restriction is that only detail recalled for the first time under hypnosis or thereafter will be advanced as evidence in support of the original recollection.
2. The substance of the original recollection must have been preserved in written, audio or video recorded form.
3. The hypnosis must have been conducted with the following procedures:

(a) the witness gave informed consent to the hypnosis;
(b) the hypnosis was performed by a person who is experienced in its use and who is independent of the police, the prosecution and the accused;
(c) the witness's original recollection and other information supplied to the hypnotist concerning the subject matter of the hypnosis was recorded in writing in advance of the hypnosis; and
(d) the hypnosis was performed in the absence of police, the prosecution and the accused, but was video recorded.

All of these criteria are capable of being met and are similar in terms to those recently determined by the Queensland Director of Public Prosecutions.

The fact that a witness has been hypnotised will be disclosed by the prosecution to the defence and all relevant transcripts, recordings and information provided to the defence well in advance of trial in order to enable the defence to have the assistance of their own expert witnesses in relation to that material, if desired.

Potential unreliability in the testimony of a witness (which is a separate issue) will ultimately have to be resolved on a case by case basis but (in the case of a prosecution witness) the onus lies on the prosecution to prove that it is safe to admit evidence of this character. That consideration is likely to be critical and compliance with the guidelines is of paramount importance. With this in mind, a potential witness should not be considered for hypnosis until all other reasonable avenues of inquiry have been exhausted.

Tillot has determined further that the testimony of a witness who has undergone the psychotherapeutic procedure known as EMDR (Eye Movement Desensitisation and Reprocessing) presents the same or significantly the same dangers as that deriving from hypnosis. Accordingly, the guidelines and considerations referred to above in relation to hypnosis will apply, as I have previously indicated, to evidence given following EMDR.

These considerations do not apply to the evidence of an accused person, but they do extend to witnesses for the defence.

I would be grateful if you would inform all investigators as early as possible. I have provided this information to my officers and I am sending copies of this letter to the Law Society and the Bar Association so that their members may be made aware of the approach that will be taken to this evidence in future. ❑

Vive la France?

Like all barristers, Andrew Robins knows there are two sides to every story. This is his view of one of this year's explosive topics.

Dear Editor,

I really think it is time someone said a few words on behalf of the French.

In August 1995 forces of the French Foreign Legion against formidable opposition and in the full glare of lots of people watching on television successfully defended the integrity of vital French coral with minimal loss of life. Regrettably, a French frigate was rammed by a sunfish with considerable damage to the Papier Maché.

It is the third Greenpeace War won for France this century. In fact, it's the third War of any kind won for France this century and that is a very important thing to remember.

The honour of France is very important - to the French.

It is also very important to remember that none of these current problems would ever have arisen if the Germans had not behaved so badly over the last century or so. With the exception of Winston Churchill and a few Eurosceptics, no-one ever said a Europe Sans Frontierres with the Reichmark as the reserve currency was a bad idea. But even good ideas have to be handled with sensitivity. No-one could argue that the Germans' original European Community proposals were handled with sensitivity.

In the matter of French honour, of course, the Australasians are not as blameless as they would have themselves believe. Clearly they have behaved with insensitivity and a lack of understanding for a very long time. That is not altogether surprising for people who do not fully understand when to eat cheese.

Of course, Australasians are buried in France. So are many other nationals. But that is not France's fault. It was the Germans who are to blame for that, although they suffered severe provocation. It is true that Germans were not supposed to move to France in numbers without visas until Dix Neuf Quartre Vingt Douze. Loss of life is very, very regrettable of course, but it must be remembered that the Australasians behave very badly when they are in France and on one occasion delayed the creation of a European Economic Community for a very long time by needlessly inflaming the Germans. The Germans might have been persuaded to be reasonable in 1914-18 if they had not been chased through farm land by Australasian persons yelling "cold steel". Additionally the disruption to the distribution of domestic and export farm subsidies under the Common Agricultural Policy, so caused, is only now being fully resolved. Their manners were an outrage to French culture and womanhood by their own account. To quote at random -

> *"Frogville 1918 (or some other time) because I'm too blind to remember - We gave the sausage eaters a bloody great boot of the size 12 up the date then we sank a few crates of the local grape juice. Local Madamoiselles were not unkind on the eye and there'll be a fair few little Diggers farming shrapnel around here in the future I can tell you."*

This attitude is, and was, unacceptable.

Now Australasians intervene in totally internal French Affairs once again, albeit with armed forces of a totally different order. Insufferably they describe fully integrated French territory as a "Colony". Do they not have Aborigines? Are their Aborigines happy persons? Of course not. How would you feel if every time you wanted to take your togs off and throw a spear at a marsupial a bus tourist took your photograph and called you adorable - and in Japanese! This is the pot calling the kettle pied noir! As a retired goose stuffer from Perigord said recently, the Australasians should "mind their business".

They should also take a lesson from France. France never intervenes in foreign places, even if it does find France in funny places - Morocco, Algeria, Indochina, Polynesia and so on.

"France never intervenes in foreign places, even if it does find France in funny places ..."

The French are fully entitled and fully capable of resolving their own domestic problems with their own Foreigners in their own way. That is why they have the Foreign Legion. They are an elite Force of foreign persons each of whom has to attend very intensive training in the appreciation of regional cheeses and sign an undertaking to bite the entrails out of the Easter Bunny on request and never, ever to shave away the last trace of stubble. A good head scar is always an attraction in a candidate was experience gained in an SS panzer division at feldwebel level or below. Soccer hooligans are encouraged on the understanding that they may not wear the Union Jack on their underpants without written permission of the Department for the Protection of the Integrity of the French flag and language, in French, which none of the British Legionnaires can read.

It should also be fully understood that the "Rainbow Warrior" is not a ship of Peace. Does anyone really believe that a ship so named is harmless? If the first "Rainbow Warrior" was so harmless, why did it explode?

What has been described as an attack by the Foreign Legionnaires is also an appalling distortion. One official from the Quarantine Service de Francais merely wished to inspect the food substances on "Rainbow Warrior" to make sure that the barbaric practice of pasteurising cheese was not introduced onto French Coral. In fact, this was all a misunderstanding.

All food substances on board the ship were organic and their use forgiven by their respective spirit essence following a traditional ceremony. The ceremony was carried out according to a belief system which deserves and is entitled to be treated with respect under guidelines produced by the Australian government under the United Nations Cargo Cult and Other Daft Religions Tolerance and Respect Treaty

signed, ratified and incorporated into Australian domestic law.

Incidentally, the full text is available with an annexed working paper dealing with full recognition of the legitimate rights and expectations of Lesbiansandgaymen and Aboriginalandtorresstraitislanderpersons as well as, for just $120 (printing cost only).

Yet the official was met with incivility. Then he was trapped in a room described as an Astral Healing Zone and subjected to the separation of colours through rock crystals, Enya Music and wommons chanting "negative energy". The wommons had not shaved their legs before receiving an important official and none of them wore a Chanel suit even through the Greenpeace organisation could afford several out of their rubber ducky budget.

Far worse than that, the rubber duckies in question ran away from the mothership and no-one can find them. France cannot be held in any way responsible for the safety of the duckies in question.

The reaction to the action of the Legionnaires is disproportionate. The Foreign Legionnaires, and with no regard for their personal safety, only used their tear gas to get the poor Quarantine man out and only used their guns to eliminate the New Age music. The full force of 150 assembled was not in fact used. It's just that everyone wanted to come along as the scheduled porpoise bayonetting exercises are never fully satisfactory. The porpoises never stand still but swim around in circles in an insulting manner and the Legionnaires of British origin merely chant "load of rubbish" and a filthy terraces song about celery.

In all, the French have done their very best to handle the matter with sensitivity from the very beginning. It was the Polynesians who named the atoll "Mororoa", not France. In fact, when the morbidity of the name used by the Polynesians became apparent, the French changed it. "Mururoa" is a far nicer word suggesting persons lining up against a wall for a cheese tasting or a shellfish done in a light white sauce. What greater sensitivity could anyone want?

Then there is the allegation of risk. Does anyone really think that the bombs work? That is why they are tested. They don't work nor are they ever likely to be used if they did. They are a very limited, very reasonable deterrent designed to protect Vanessa Paridis, who is this week's French Feminine Icon of the Century, from Bavarian ski instructors called Helmut. The delivery system is prestressed rubber prepared for the purpose by the Tourism, Very Short Stay Hotel, Restaurant and Entertainment Division of a leading manufacturer of French rubbers and allied products. The range is from the Ille de la Cité where the French Non Foreign Legion is based to Oberburstandgurgl.

There is no danger to anyone. Nothing explosive will in fact be used in any of the testing. But don't tell the Chinese. The Chinese test really big bombs all the time, which in fact do work very well and no-one complains about them. When they test bombs people give them Hong Kong.

What in fact happens is as follows. Sound Systems Advanced Product Visions de Francais SA which is a model of co-operation between government and industry at the leading edge of the new Europe have installed a state of the art sonic and vibratory amplification module. All staff wear wash and wear casuals designed by the Ecole de Haute Couture de Departement de Protection de Culture Francais. At the designated moment Le Chef de Bomb says "Bang" and the Legionnaires shake the walls a bit. The impulses feed through the amplification system and at the same time Le Chef de Bomb kicks the seismograph with a boot specifically designed for the purpose by the Industrial Division of a leading French manufacturer on an anonymous basis. At the same time the Lagoon Vibration Referral System installed in the Lagoon by responsible aerospace engineers relays the impulse from the amplification module. Coral sand gets tossed about a bit and the Lagoon does a wobble. The effect is photographed by a leading French cinematographer who prefers not to be named any more because wommons will throw paint at his sable at Cannes.

"Radioactive substances can be dangerous."

To confuse the Chinese a diversion is prepared which involves Le Chef de Propaganda de Cuisine lightly frying unpalatable fish. These fish are later scattered throughout the atoll so the Germans and the Chinese and others will think Force de Frappe is really something. But, of course, they know it isn't.

It's a diplomatic ritual.

Unfortunately, those Greenpeace Hippies chronically fail to understand the points being made. That is because they only eat root vegetables and do not understand that foie gras geese are never asked to do any work whatsoever and are never exposed to the cruelty of being stroked by Wommons who never wear properly tested perfume.

The fish are not radioactive. They are merely fried lightly in a butter sauce with a trace of dill.

After the ceremony the actual testing takes place. The reference to testing has nothing to do with the accelerated collision of the atoms of the Uranium those Australians keep begging the French to buy to correct their balance of payments problems. Really the French do what they can to help the Australians by buying from Australasia far more than they sell, but they can only do so much. If the begging does not stop the French will have to consider trade sanctions. Radioactive substances can be dangerous.

The testing in fact is to determine the best combination of wine and cheese in tropical conditions. At the end of the testing, as a special dispensation, the British origin Legionnaires are allowed to drink their Carling Black Label and sing their Neanderthal songs about celery.

"Celery,
Celery,
If she won't ..."

Never mind.

I hope this letter will lead to a better understanding of the problems faced by the French and the measured response to extreme provocation and serve to correct many unfair and false impressions. After all, it could be far worse. The French might start testing real bombs in the Loire Valley. Then we'd all be sorry and it would be our fault.

We'd all have to drink domestic and we'd never really master the finer points of cheese.

Perhaps the restraint of the French can best be appreciated in this way.

Imagine if you will a hypothetical place (extraterrestrial France) in another time and space. You are sitting in a room with orange light. Before you is a button. The button is encased in an attractive carry case modified by the Department for the Advancement of French Leisure Products from a design by Louis Vuitton. The button will release an Exocet missile which works. The "Rainbow Warrior" is about the enter the Exclusion Zone. You can imagine an explosion and nothing left beyond a slick of natural organic oils and one entire boatload of environmentalists gone, poof, complete with rock crystals, New Age music, chants and cosmobabble.

All you have to do is press one little button. The law (French) is your friend. Your finger moves toward the button. Who could blame you - after all, you are in hypothetical France.

In all honesty - what would you do? ❑

UK Transfer Test for Australian Lawyers

Qualified Australian lawyers who wish to qualify as solicitors of the Supreme Court of England and Wales can do so after passing an aptitude test. The Qualified Lawyers Transfer Test ("The QLTT") is a conversion test which enables lawyers qualified in jurisdictions outside England and Wales to qualify as Solicitors in that jurisdiction. It is conducted by The College of Law of England (through the QLTT Board) as agent of The Law Society of England and Wales.

At present tests are held twice a year (in Spring and Autumn) in London, Hong Kong and (since November 1994) Toronto. Since the QLTT was established in 1991 a total of 676 Australian lawyers have travelled to one of these centres to sit the test.

Lawyers qualified in Australia are required to sit only one of the four sections of the test, namely Professional Conduct and Accounts. They are generally exempt from the other three sections (Property, Litigation and Principles of Common Law).

A separate department of The College of Law, which is the largest legal education provider in Europe, provides instruction for the QLTT in the form of distance learning packages for all sections of the test and a lecture programme for Property, Litigation and Professional Conduct and Accounts. Traditionally lectures have been held only in London but, beginning in 1995, a four-day revision program will be held in New York in conjunction with the Practising Law Institute of New York. Subject to demand, the College could run a similar program in Australia.

The College has established an excellent reputation for supplying quality distance learning courses for the QLTT so that lawyers can prepare for the examination in their own homes, at their own pace and at convenient times. Study materials include manuals, assignments which are marked by experts and returned with comments and model answers, and a 24 hour telephone helpline in the UK. For overseas candidates, tutors deal with enquiries by fax. All the tutors are full time staff at the College and are qualified as solicitors or barristers. They have many years experience of providing training to both trainee and qualified solicitors. The College is accredited by The Council of Accreditation of Correspondence Courses in the United Kingdom.

Nick Olley, head of QLTT Tuition at The College of Law said: "We are looking to run more preparatory courses for Australian lawyers. Our distance learning courses are likely to prove the most popular but the College would be prepared to put on a lecture program in Australia if the demand was there. With increasing commercial links between countries it is becoming essential for lawyers to have an understanding of the law of other nations and international firms in Australia will see the advantages of having an English qualified solicitor on the staff. We also expect interest from Australian qualified lawyers already working or about to work in England and Wales."

Further information on preparatory courses for the QLTT is available from:

The Distance Learning Department,
The College of Law,
Brabouef Manor,
St Catherine's, Guildford,
Surrey GU3 1HA,
England.
Telephone 44 483 480305 Fax 44 483 480305

Regulations, syllabus and entry form for the test may be obtained from

The Clerk to the QLTT Board,
The College of Law,
14 Store Street, Bloomsbury,
London WC1E 7DE England.
Telephone 44 71 291 1313 Fax 44 71 291 1312.

Before entering for the test, prospective candidates must apply to The Law Society of England and Wales for a Certificate of Eligibility. This may be obtained from The Law Society, Transfer Unit, Ipsley Court, Redditch, Worcestershire B98 OTd, England. Telephone 44 527 517141 Fax 44 527 510213. ❑

"A Lady of Law"

Sybil Morrison was a woman who deserves remembering by the Bar. She was a trailblazer, a barrister of purpose and courage and intelligence, yet her name means little or nothing now. It is on no honour board. There are no legends or anecdotes among barristers about her advocacy, her personality or her eccentricity. Although of some notoriety in her own time, her impact is forgotten today.

Sybil Morrison was the first woman in New South Wales to practise as a barrister. Her very existence was an achievement. In 1918, the then Attorney, Mr D R Hall, oversaw the *Women's Legal Status Act* which allowed women to become barristers. It was not enough. In 1921 the first woman admitted, Ms Ada Evans, was not allowed to practise because the then Chief Justice, Sir Frederick Darley, did not approve of women at the Bar: carrying judicial independence too far, I think.

My research does not record what happened to Sir Frederick. I think he died, but three years later his successor admitted Sybil Morrison. A press report described the then Chief Justice as being *"in quite a twitter"* at the admission ceremony. One journalist claimed that the Chief Justice was discomposed by femininity:

> *"There before him in the body of the court stood a demure little figure with the usual black gown and little white bib. But despite the disguise, it could not look anything but girlish. Sir William Cullen was obviously conscious of the fact - the well-worn phrases preceding the admission absolutely would not trip readily off his tongue ..."*

It is impossible to imagine Gleeson CJ being similarly disconcerted.

The second lady barrister made it very clear that she would be practising. The press were full of admiration for her courage:

> *"Equity law is very difficult and complex. But Mrs Morrison is confident she is equal to its intricacies."*

NOT MERELY IN NAME

Mrs. Sybil Morrison is not a barrister merely in name. She has proved that she can hold her own in legal arguments in our courts.

Like many pioneering women, Sybil Morrison benefited from the support of a powerful male mentor - her first brief came from the solicitor who, as Attorney General, had supported women's admission. She paid tribute to him publicly:

> *"...He has now shown that his concession to women then was not merely political ... He has given definite proof of his faith in their ability".*

In Sybil Morrison's time the description "lady" was still regarded by both men and women as a compliment. Recently, I tried to explain to a man why working women today bristle at being called "ladies". It seems as though we're just being difficult, or politically correct, but this is not the case. The term "lady" conjures up for many of us a code of behaviour which is incompatible with professional success.

In the past the rules of ladyhood imposed a heavy constraint. It started in childhood.

Young ladies didn't climb trees - in other words, ladies did not take risks. Ladies should act timid. Ladies didn't run - in any event ladies often wore clothes which hobbled them. Ladies looked demure, spoke softly. It was unladylike, indeed unfeminine, to argue.

To be a lady required compliance with an image of femininity at the expense of a woman's reality. Fundamentally, it meant reigning ourselves in, being less than we were capable of ... too often it still means that.

Now, how can anyone succeed as a barrister if they are supposed not to argue?

The ambivalence of juxtaposing "lady" with "lawyer" can be seen in Sybil Morrison's life. Clever women were stereotyped as unwomanly and assumed to be unattractive to men. Perhaps even "strident harridans" which is still a term thrown at some of us. In 1925 the *Daily Telegraph* perpetuated this unhelpful idea with a breathless defence of Mrs Morrison under the headline "not a blue stocking".

"Quite the coolest looking figure in the city yesterday was Mrs Sybil Morrison, our clever barrister. Walking to her chambers in Phillip Street, she looked charming in a fluffy frock of the finest blonde lace and chiffon. Her wide brimmed hat was of blue balibuntal which matched her sparkling eyes. The whole ensemble contradicted the theory that a clever varsity graduate should be a blue-stocking."

Our poor lady barrister was under relentless pressure to prove her femininity. She never missed a chance to demonstrate that she was a real woman, despite being a barrister. The *Brisbane Daily Mail* reported that she was *"stitching busily during the interview which was evidence that her studies and profession had not supplanted her womanly attributes".*

And

> *"Like most women who have proved their utility and adaptability for spheres usually considered the monopoly of the male, this lady barrister retains her femininity in spite of the legal perruque".*

And

> *"In spite of her legal mind, Mrs Morrison is a great housekeeper and she is noted for excellent cooking ..."*

The *Evening News* breathed a sigh of relief that

> *"... She was engaged in the feminine occupation of embroidering a supper cloth ... Anyone more unlike the conventional idea of a stern advocate in a court of justice, it would be hard to imagine".*

It would be nice to think that she kept a piece of sewing availably specially to whip out for the reporters' benefit. Sadly, it was probably her genuine personal struggle to reconcile "lady" and "lawyer".

The *Australian Woman's Mirror* commented in detail:

> *"Although Mrs Morrison looks out so seriously from the severe legal dress of wig and gown, she is an exceedingly smart up-to-date frocker ... (Mrs Morrison finds it amusing that most people voice wonderment at her youth and pretty clothes) 'why cannot the two go together', she asks, 'since the same people look for quite a fashionable cut of clothes from a man barrister? ... I am very domesticated and a splendid cook ... I like the housewifely arts and often practise certain of them, particularly cooking, from choice not necessity.'*

The journalist ended the article with the comment:

> *"the most lasting impression one gets of NSW's first woman barrister is that she is pre-eminently feminine and that no man could so ably plead a woman's cause."*

The media never missed a chance to contrast dainty femininity personified by Sybil Morrison with the musty old masculine law.

But underneath the accolades in her scrapbook is another story. The compromises, the discrimination, and her personal ambivalence are its sub-text.

Despite her initial intention to practise in equity, within three years she had changed her tune. Now she commented how suitable women barristers were to represent other women or to appear in the divorce and children's court. Why?

She had begun her first marriage to an Englishman with the stipulation that she must be allowed to finish her law degree and to practise at the Bar. The marriage failed. Why?

After more than a decade at the Bar, she married for the second time. Shortly after she stopped practising - why? She had always denied that having a profession meant a woman would neglect her domestic role but a newspaper suggested the two had finally proved incompatible after all.

"Mrs Carlyle Greenwell, formerly Mrs Sybil Morrison, is the first woman barrister to have held a brief in the NSW courts. But today matrimony is the more important aspect of her career. In her stead, Miss Nerida Cohen is the only woman barrister in the state."

HER FIRST BRIEF

Lady Barrister in Court

APPEARS FOR WIDOW

In Mr. Acting-Justice Maughan's court to-day. Mrs. Morrison, the only lady barrister in New South Wales, appeared in court to hold her first brief (instructed by Mr. D. R. Hall).

The case was one in which the client, a widow, was asking the court to rectify a will in which her deceased husband had left her £100 only out of £800 and had left £100 to provide for monuments being erected. The matter was held for filing further affidavits.

In 1916, Mr. Hall introduced the Testators Family Maintenance Act, which gives the court power to rectify wills. In 1918, as Attorney-General, he steered through the Assembly the Women's Legal Status Act, which gives woman the same right to become barristers as men, and to-day. Mr. Hall appeared as the first solicitor to instruct the first lady barrister to appear on an application made under one of the acts which he himself passed.

MRS. SYBIL MORRISON,

The first lady barrister to appear on brief in the New South Wales Supreme Court.

It is a dangerous assertion for a barrister to claim that the profession requires courage. Such a statement too easily sounds arrogant and elitist. But I am not a barrister, so I can say that it is an occupation for which you must be brave. Whether male or female makes no difference. You must have the nerve to get on your feet and risk public failure.

When your sex means you are in a minority, you are even more vulnerable. Because you are more noticeable, more people watch you. Their gaze is more critical because you are unusual. And because you are different to most of the observers, their support is not so quickly given. And your individual mistakes risk being extrapolated to the rest of your subgroup. Each appearance you make is inadvertently a test case for the female of the species. Nothing personal about it - just the gender gap.

If it takes courage for men to be barristers - it has required even more courage of women. This remains true today for many, although it is a distinction which should soon be irrelevant as women barristers become commonplace.

It is difficult to overestimate the nervous tension which being the only woman - and the first - must have created in Sybil Morrison. The relentless press attention offers a glimpse of it. Doubtless sometimes the glamour of it must have been a compensation but we can only guess at how it felt to spend so many years as an oddity.

She played fair with the men, however:

> *"In the beginning when I was terribly nervous, the men used to escort me along Phillip Street and into the court. There certainly is a prejudice against women in the law but I must say that all the men were very good to me when I started".*

Nevertheless, it is unlikely that this male chivalry offset the isolation of being the only woman among them.

With hindsight it is obvious - it must have required daily fortitude to be "Mrs Sybil Morrison, a Lady of the Law". ❑

Babette Smith

First Corporate Law Simplification Act 1995

Corporations Law Simplification Task Force

Introduction

The *First Corporate Law Simplification Act* 1995 (the Act) has been passed by the Parliament and is expected to commence by early December 1995. The Act makes a number of significant changes to the Corporations Law concerning proprietary companies, company registers and share buy-backs. The changes are designed to bring major improvements in the Law, especially for small business.

Incorporation of sole traders

The Act makes it possible for a sole trader to incorporate as a proprietary company without the need for a second member or director. Existing proprietary companies will also be able to operate with only one member, although they may have to amend their articles before moving to a single director/member structure. For example, it will be necessary to consider the adequacy of existing articles relating to the fixing of the company's seal or the holding of directors' meetings.

The Law will include some special rules for the operation of single member/director proprietary companies:

- the sole director may also be the company secretary. The director will be able to witness the use of the company seal by stating next to their signature that they are witnessing the seal in their capacity as sole director and sole secretary of the company[1]
- the sole member will constitute a quorum at general meetings of the company.[2]

However, it will not be necessary for single-shareholder companies to call formal general meetings. Where a single-shareholder company is required to pass a resolution, the recording in writing of the shareholder's decision will be the same as the passing of a resolution. This rule will also apply to director's resolutions. The writing down of the shareholder's or director's decision will have effect as the minute of the resolution.[3]

Where a sole director is required by the Law to make a declaration, for example, for the purpose of disclosing an interest in a particular contract, it will be sufficient to record the declaration in writing. That record will also be the minute of the declaration.[4]

The Act also deals with the death, bankruptcy or mental incapacity of a sole director who is also the sole member of a company.

In this situation the personal representative or trustee of the former director will be able to appoint a person as director of a company. The personal representative or trustee may appoint themselves as director.[5]

AGMs and Annual Returns

The Act abolishes the requirement for proprietary companies to hold annual general meetings (AGMs).[6] The date of the AGM is currently used to determine the date by which a proprietary company must lodge its annual return. As a consequence of the abolition of the requirement to hold an AGM, the date for the lodgment of all proprietary company annual returns has been moved to 31 January.[7] Unless the ASC agrees to another date, all proprietary companies will be required to lodge their next annual return by 31 January 1996.[8]

Under an amendment to be made to the Corporations Regulations, starting with the 1996 annual return (which must be lodged by 31 January 1997), proprietary companies will no longer be required to include financial information in their annual return.

Proprietary company accounting requirement

The Act abolishes the existing complex distinction between exempt and non-exempt proprietary companies and introduces a new distinction between "small" and "large" proprietary companies.[9]

Only large proprietary companies will have an automatic requirement to prepare accounts for the purposes of the Corporations Law.

Under the Act, a company is a small proprietary company for a financial year if it satisfies at least two of the following criteria:

a) The consolidated gross operating revenue for the financial year of the company and the entities it controls (if any) is less than $10 million.
b) The value of the consolidated gross assets at the end of the financial year of the company and the entities it controls (if any) is less than $5 million.
c) The company and the entities it controls (if any) have fewer than 50 employees at the end of a financial year.[10]

In counting employees for the purposes of this test, part-time employees are to be counted at an appropriate fraction

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1 s.164(3)(e)
2 s.249(1)(a)(i)
3 s.255A(1)-(3)
4 s.255A(4)-(5)
5 s.224A
6 s.245(2A)
7 s.335(1A)
8 s.1410(1)
9 s.45A
10 s.45A(2)

of the full-time equivalent.[11] The amount of a company's consolidated gross operating revenue for a financial year and the volume of its consolidated gross assets are to be calculated in accordance with the accounting standards.[12]

All companies will continue to be obliged to keep accounting records. These records must correctly explain their transactions (including any transactions as trustee) and financial position in a manner which will enable true and fair accounts to be prepared from time to time and to be conveniently and properly audited in accordance with the Corporations Law.[13]

Shareholders holding 5% or more of the voting shares in a small proprietary company may require the company to prepare financial statements. Any financial statements prepared by the company at the request of shareholders must be sent to all shareholders.[14] In addition, shareholders can require the audit of those statements.[15]

If the request is made during the financial year covered in the request, the company has until four months after the end of that year to comply with the request. Shareholders can request the preparation of financial statements up to 12 months after the end of the year concerned. If the shareholders' request is made after the end of the financial year, the request must be complied with by the later of two months after the date on which the request is made or four months after the financial year.[16]

The ASC may also require a small company to prepare financial statements. It can require the audit of those statements and the lodgment of audited or unaudited statements. The ASC must specify the date by which the documents have to be prepared or lodged. The date must be a reasonable one in view of the nature of the request.[17]

A small proprietary company that is controlled by a foreign company will be obliged to prepare and lodge its own accounts unless the foreign company has lodged consolidated accounts with the ASC.[18]

The size and influence of large proprietary companies and the large number of trade creditors which a company this size will often have make it appropriate that their financial statements be audited and lodged with the ASC. Accordingly, unless exempted by the ASC or the Law, a large proprietary company will be required to lodge audited financial statements with the ASC for each financial year within four months after the end of the financial year.[19] Large proprietary companies that are not currently required to lodge audited accounts will first be required to lodge financial statements for the 1995/96 financial year. However, for these companies the requirement that the lodged financial statement be audited will first apply in relation to financial statements for the 1996/1997 financial year.[20]

Proprietary companies which include key financial data or audited financial statements with their annual return will be required to do so for the return due on 31 January 1996 in accordance with the current rules. From then on the new rules will apply and the annual return will not be used as the vehicle for proprietary companies to lodge financial information. Key financial data will be abolished under the Regulations consequential upon the First Bill.

In deciding whether to exercise its discretion to exempt a large proprietary company from the obligation to lodge audited accounts, the ASC will be required to take into account factors such as the expected costs and benefits of the company complying with the audit requirement, and any particular difficulties that the company may face in complying with the requirement.[21] In particular, the ASC will take into account any difficulties the company may face because it is likely to move between the small and large proprietary company categories from year to year.[22] It will not generally be necessary for companies to apply individually for an exemption, as it is expected that the ASC will make an order exempting specific classes of companies from the requirement to lodge audited accounts.

A large proprietary company will not be required to lodge audited accounts with the ASC if it:

- was an exempt proprietary company on 30 June 1994 and which continues to meet the definition of exempt proprietary company as at that date;
- is large at the end of the 1995/96 financial year;
- has had its financial statements for the financial year ending during 1993 and each later financial year audited before the deadline for that year; and
- lodges a notice with the ASC within four months after the end of the 1995/96 financial year, stating that section is to apply to the company.[23] (The ASC will be able to extend this four-month period.[24])

Consolidation of the accounts of a large proprietary company

The ASC has indicated that it proposes to revise Class Order 91/996 in line with the changes made to the Corporations Law by the Act. This Class Order currently relieves wholly-owned subsidiaries of certain of their reporting obligations. Under the draft revised Class Order, accounting and auditing relief would only be available to proprietary companies.

11 s.45A(5)
12 s.45A(6)
13 s.289(1)
14 s.315(3A)
15 s.283C(6)
16 s.283D(5)-(7)
17 s.317
18 s.283B
19 s.283A
20 s.1409
21 s.313(11)
22 s.313(11A)
23 s.317B
24 s.317B(4)

Company registers and notifications

Companies will no longer be required to keep registers of directors, principal executive officers and secretaries, directors' shareholdings, and buy-backs.[25] For listed companies, the requirement to keep registers of beneficial ownership of shares and substantial shareholdings will be abolished.[26]

Some information currently required to be included in these registers will have to be lodged with the ASC, or the ASX in the case of a listed company. For example, details of directors and secretaries will still, as at present, have to be lodged with the ASC as they change.[27]

A further change of some practical benefit is that company directors and secretaries who resign or retire will be able to notify the ASC directly of their resignation or retirement. In the event that the company fails to notify the ASC of the director or secretary's resignation or retirement, this will ensure that the name of the officer is able to be removed from the ASC's database.[28]

Share buy-backs

The Act will make share buy-backs a practical commercial option for companies wishing to restructure their capital. The Act substantially simplifies the procedures required for a company to buy-back its own shares. The table at s. 206C conveniently sets out the steps required for the different types of buy-back.

The new rules should make a share buy-back a much more attractive option than at present for the exit of a "partner" from a small proprietary company, and the return of excess capital to shareholders.

The rules for significant share buy-backs involve shareholder approval and disclosure of material information about the transaction to the vendor shareholder and the ASC.

Conclusion

The Act is the first legislative change to the Corporations Law to result from the Attorney General's program to rewrite and simplify the Corporations Law. The Second Corporate Law Simplification Bill, released for public comment on 29 June 1995, will make further major improvements in the Law, especially in the areas of accounts and audit, share capital, company formation and company meetings. Work has also commenced on a third Bill to deal with company officers, related party transactions, fund raising and takeovers. ❑

Ian Govey

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25 ss.224, 235, *First Corporate Law Simplification Act* 1995, s.3

26 ss.715 and 724

27 s.242(8)

28 s.242C

Motions and Mentions

Australian Bar Association Conference

The Australian Bar Association Conference will be held in San Francisco on 18-21 August 1996 and is being organised by the Australian Bar Association in conjunction with the San Francisco Bar Association. For further information please contact the Conference Secretariat, Level 5, Inns of Court, 107 North Quay, Brisbane, 4000. Telephone (07) 3236 2477 or fax (07) 3236 1180. ❑

Opening 1996 Law Year-Western Sydney

The Annual Western Sydney Inter-Church Service to mark the opening of the 1996 law year in respect of the western region of Sydney will be held at the Leigh Memorial Uniting Church, Parramatta on Monday, 29 January 1996 at 9.30am.

The speaker will be the Honourable Mr Justice Kenneth Handley AO, Judge of Appeal, Supreme Court of New South Wales. ❑

Superannuation 1996

Superannuation 1996, A National Conference for Lawyers, will be held in Canberra, ACT, between 22 and 24 February 1996.

Enquiries should be directed to Dianne Rooney - Tel (03) 602 3111 ; Fax (03) 670 3242. ❑

Directory of Short Courses in Australian Law Courses Released

Australia's law schools are offering a wide variety of short in-depth courses for lawyers, from both Australia and overseas countries. Lawyers can, through these courses, "tap into" the enormous depth of talent and expertise held by many of Australia's law academics.

The Centre for Legal Education, working in conjunction with the Committee of Australian Law Deans, has now published a *Directory of Short Courses available in Australian Law Schools*. The Directory is available free from the Centre for Legal Education.

Almost 120 short courses are being offered throughout Australia during 1995. These supplement the extensive continuing legal education programs offered by the legal professional bodies and others.

Unlike the CLE programs, the short courses normally deal with the topics in greater depth, and thus cater especially for those looking for a thorough grounding in the particular areas.

The *Directory of Short Courses available in Australian Law Schools* can be obtained free of charge from the Centre for Legal Education, GPO Box 232 Sydney NSW 2001, telephone (02) 221 3699 fax (02) 221 6280. ❑

Justice

An Australian visiting the United States might not be surprised at the lack of ceremony when judges enter and leave a courtroom nor at the absence of wigs. They might, however, see and hear things quite foreign to the Australian concept of justice, such as a prosecutor appearing on talk-back radio on the morning after a man is sentenced to death for murder.

This story is not about the O J Simpson murder trial which, of course, is a one-off because Simpson is, or was, a super sports star. It concerns two unrelated everyday American court cases which took place in September 1994. On Tuesday 20 September, Lancaster County District Judge Donald Endacott in Lincoln in the State of Nebraska pronounced the death penalty on Roger Bjorklund. Bjorklund had been convicted at an earlier date for the particularly brutal murder of an 18-year-old girl. Next day the *Omaha World-Herald* report of the case included a brief interview with the prosecutor, Lancaster County Attorney Gary Lacey, who expressed only slight hope that Bjorklund's trip to the Nebraska electric chair would be a quick one. "I'll probably be dead before Roger Dale Bjorklund is executed", he told the paper.

" To Americans the appearance of the prosecutor on talk-back radio would be perfectly natural."

A jury had found Bjorklund, 32, guilty of the abduction, rape and murder of University of Nebraska-Lincoln student Candice Harms. He and another man, Scot Barney, who had pleaded guilty and received a life sentence, had murdered Miss Harms near Lincoln almost two years before, on the night of 22 September 1992. They had searched the streets of Lincoln for a victim to abduct and fulfil a sexual fantasy. Miss Harms was ordered from her car at gunpoint, tortured, raped and later shot dead.

Her partially-buried body was found on 6 December 1992, after Barney led police to her shallow grave in exchange for avoiding the death penalty.

Also on 21 September, the day after the sentencing, Lacey, who is an elected official, appeared on a talk back program on an Omaha radio station and discussed the case with the talk-back hostess, Cathy Fife. Lacey took calls from listeners, one of whom asked whether it was true that the two men had posed as policemen. Lacey told the caller that Bjorklund and Barney had searched for a person for what they wanted to do and were about to give up when they saw Miss Harms driving her car. She was driving home from a date with her boyfriend. They followed her to a parking lot which happened to be only 50 feet from her parents' home.

Bjorklund approached her car with a police radio scanner and a gun, said Lacey. He got inside her car and drove it away. Later they transferred her to their own car.

Another caller asked what pre-trial motions were made in the case. Another asked if the two men were suspected in the murder of another young local girl, to which Lacey said "no".

In reply to the talk-back hostess, Lacey said Bjorklund had recited lines from the thriller film *Cape Fear* to Miss Harms during her ordeal. Also in the interview Lacey told the hostess that after the case concluded, the victim's parents had wanted to know pretty fully the details of what went on in their daughter's ordeal with the murderers. To Americans the appearance of the prosecutor on talk-back radio would be perfectly natural. It was a chance for members of the public to gain information that would not be available from any other source.

The newspaper report also included the following:

"Among the spectators in the packed courtroom were Bjorklund's wife and five members of the jury from his trial. The jury was selected from Cheyenne County in Nebraska's Panhandle. Roxanne Born of Sidney, the jury forewoman, said the group left Sidney at 2am Tuesday to witness the sentencing to 'give us some closure' on the case."

In similar circumstances in either New South Wales or Victoria a newspaper would find it impossible to publish a juror's name as any interview with a juror after a case is forbidden. If interviews with jurors after a case were allowed here, it would at least give jurors an opportunity to explain why they did or did not reach a certain decision. Sometimes jury decisions, or the lack of one, are controversial but literally no one outside the jury room has a clue as to the jury's thinking.

Also in September 1994 this reporter witnessed a civil law suit in its first day, 13 September, in the Superior Court of the County of San Diego, California. Six women, former employees of a bar and restaurant business, sued the company which ran the business, and two managers, one male and one female, alleging sexual harassment in violation of public policy and the law. A jury panel of 50 persons had been summoned to the court and a computer scrambled a non-alphabetical list of their names. The clerk called the first 24 for questioning by the judge with the first 12 actually sitting in the jury box.

In Australian courts, both civil and criminal, the most that is required of any potential juror is their name, address and occupation. Of that, only their name is usually made public. For an Australian visitor, therefore, it was surprising to hear the depth and intimacy of questions asked of this jury panel.

As each name was called, that person was required to answer questions by the presiding Judge, James A McIntyre. The person would state his or her occupation, marital status, what district they lived in, the names and ages of any children and who the children were married to if married. They were asked to give the children's occupations and that of their spouses and what type of work they did, and also whether their own spouse was working outside the home and, if so, where, and what type of work they did. One had nine children of whom eight were married. He gave the ages and occupations of each child and each spouse, what type of work

they did and where they worked.

Each potential juror stated if they had any previous jury experience, criminal or civil; and if they had, whether they reached verdicts in those cases. They were also asked if they had been a party or witness in any previous court case, and what type of case it was. Two potential female jurors indicated they had been involved in cases relating to sexual matters. Asked by Judge McIntyre if they wished to describe them in public they said they would not and he said they could speak later in private.

He also asked each potential juror: "Is there anything in your background or experience of which you have not already spoken which you should tell us about?" One said he would not place as much credit on the evidence of a psychiatrist as he would on that of other witnesses. Asked why by the Judge he said psychiatry was an "inexact science". The Judge said that perhaps he should serve on another type of jury and discharged him.

At the end of the first day, about 4.10pm, Judge McIntyre had not completed his questioning of the panel. As you would expect, before sending them home he advised them not to discuss their jury duty beyond saying they were involved in a jury. Because if they said it was a sexual harassment case that would invite comments from other people which would be unwelcome to potential jurors. "When the case is over you can talk about it to your heart's content", he said with an avuncular smile, a comment you would be unlikely to hear from a judge in New South Wales or Victoria.

On subsequent days counsel for the parties would quiz the panel with even more pointed questions before the final selection. (In San Diego County the same procedure is used for the selection of juries in criminal trials.) As I had to leave San Diego on the second day I could no longer follow the case, but I later learned that a jury of six women and six men and a male and female alternate were sworn on the third day. The trial took 26 court days including jury deliberations of slightly over three days and they returned their verdict on 1 November 1994. The jury returned several days later to decide on punitive damages and awarded none.

The jury found for the company and the female manager on all the matters in which they were involved. Ultimately, the only plaintiff to succeed was the sixth plaintiff. The jury found that the male manager committed assault and battery and intentionally inflicted emotional stress on all the women except the fifth plaintiff, but the offences caused damage or injury only to the sixth plaintiff. The jury awarded her $US27,140 in compensatory damages. The plaintiffs subsequently requested a new trial and judgment notwithstanding the verdict but Judge McIntyre denied both motions.

In no Australian State or Territory is there any courtroom examination of prospective jurors except applications to the judge to be exempted from serving on the jury.

The most information that is available in any Australian jurisdiction for a criminal or civil jury is the name, address, occupation and appearance of each potential juror. In some States it is even less. For example, in New South Wales in a criminal trial legal representatives become aware of only the names and appearance of prospective jurors on the day on which they are summonsed - that is the day the jury is chosen. No other information is available to either the prosecution or defence.

More information is available in Queensland where by the *Jury Act* of 1929 the Sheriff is required to publish lists of jurors in some conspicuous place in the courthouse. Jury lists contain the full names, occupations and addresses of prospective jurors. The relevant jury list in a criminal case is made available to the defence usually on the day before a trial commences or, on a Friday if it is to commence on the following Monday.

In Queensland a number of commentators have argued that the publication of the lists in this manner is inconsistent with the right of a juror to remain anonymous. The contrary view is that an accused person is entitled to know whether the jurors are suitable to try his or her case. For example, is it fair for an accused charged with armed robbery of a bank to be ignorant of the fact that the jury panel for that trial contains a number of bank officers? A Queensland legal source says the English judge, Lord Denning, has succinctly stated the competing principles in his 1980 judgment in *R v Sheffield Crown Court; Ex parte Brownlow*:

> "There are two rival philosophies here. One philosophy says that the parties to a dispute ought to know whether the jurors are suitable to try the case. They ought to have access to the antecedents of the persons on the panel. ... That philosophy prevails in the United States of America. ... That philosophy has never prevailed in England. Our philosophy is that the jury should be selected at random - from a panel of persons who are nominated at random. [1980] QB 530, 541."

In civil cases in Queensland the same procedure applies. ❑ Tom Downes

Who's Interviewing Whom?

Your client telephoned before he arrived, asking for directions. He advertised the peculiarity of his presentation even before turning up.

He made a play on the words in a manner which suggested he was being deliberately facetious. His appearance fitted his manner. He has long hair tied into a tail and colourful bohemian clothes. His presentation fitted that of a denizen of Nimbin. He had a pack and he drank from a can of Coke. I asked him to drink it outside on the lawn, from which he conducted an affable friendly conversation with me through the window. He found my back garden attractive. I believe it is. ❑

(Extract from psychiatrist's medico-legal report.)

Royal Commissions Past

Mr John R Poole
"Little Haven" Beaulieu Road
Dibden Purlieu
Hants. SO45 4JF

The Hon Treasurer
NSW Bar Association
Selborne Chambers
174 Phillip Street
SYDNEY NSW 2000

Dear Honorary Treasurer,

Several points in this letter:-

First, for the records, will you kindly note my change of address as above?

Secondly, my apologies for delay in sending my annual subscription. Bankers' draft now enclosed - which is for $45 being three years' subscription.

My reason for this is that I am now in my eighties, in this care and nursing home, with an increasingly unreliable memory. This caused me to overlook your subscription notice, which I am afraid I may do again. In the circumstances, after all these years, do you think this could now be deemed to be life membership? I should hate to lose my membership by default. I think, in fact, that the Association could be up on this! If not, I think I could only be marginally in hand, and it would relieve me of this anxiety.

I particularly value my membership, which was bound up with my representation (almost as a protagonist) of my client in the Studley-Ruxton Royal Commission of 1954 on the subject of police "bashing" of the client while in custody. It lasted for several months and was "hard pounding" against the then Attorney General and the Police Commissioner and their departments - or rather, by them against myself.

At its conclusion, the Bar Council (and also the Law Institute) came out with the unprecedented step of publicly criticising the late Justice Dovey's conduct of the Commission, and in support of myself, for which I was grateful, and which led to my transfer to the Bar from the Solicitors' branch.

This did not have quite the result we all expected at that time (the stream of clients dried up - see copy press extract enclosed) nor, of course, did that Royal Commission have any immediate effect on police affairs, but it was, I like to think, the pioneer of subsequent official enquiries, to culminate in the current Police Royal Commission under Justice Wood, which at last will be significant.

I am enclosing also press cuttings of the public statements by the Bar Council and Law Institute. There cannot be many members of today's Bar who actually remember these events of 40 years ago - indeed, the new Chief Executive doesn't look old enough (from her photograph) even to have been born then! The cuttings may be of interest.

But my Royal Commission was, in its way, part of New South Wales' history - certainly part of the Bar's history - and I just wonder whether the Bar library has a full enough record of it? I possess the full complete transcript of it, and I am not immortal, so I would be willing to donate it to the Library if this were felt to be welcome?

Meanwhile, from this distance in space and time,

Yours sincerely, John R Poole

Launch of the Australian Indigenous Law Reporter

International Business Communications (IBC) has announced a quarterly publication - the Australian Indigenous Law Reporter (AILR).

The AILR covers Australian and international developments in the law that relate to and affect indigenous peoples.

The AILR provides essential information for lawyers, legislators, policy makers, lobbyists and scholars, and anyone interested in indigenous and related issues.

In the first issue of Volume 1, the AILR reports on National Native Title Tribunal procedures, and the unreported decision of the Australian Industrial Relations Commission on due and proper recognition of Aboriginal persons' cultural and spiritual beliefs, in respect of the Municipal Employees (WA) Award 1992.

Each issue contains material from the United Nations, including documents of the Working Group on Indigenous Populations, and decisions of the UN Human Rights Committee.

Subscriptions are $A85 per year or $A150 for two years. For further information contact Wendy Landa, UNSW Faculty of Law. Telephone (02) 385 2850 Fax (02) 385 1175. Subscription enquiries to Jennie Hacker. Telephone (02) 221 6199 Fax (02) 221 5928. ❑

LEGAL REBUKE FOR MR. JUSTICE DOVEY

The Bar Council of New South Wales and the Council of the Law Institute yesterday strongly criticised Mr. Justice Dovey and his conduct of the Studley-Ruxton Royal Commission.

The Bar Council, in a statement, said Mr. Justice Dovey "failed in a signal degree . . . to exercise dignity, tolerance, judicial calm, and patience."

'Standards of fairness'

It said: "These qualities are indispensable for respect and confidence of the community in the courts and other tribunals."

The action of the Bar Council and the Law Institute is unprecedented in New South Wales.

Both bodies are understood to have studied the official Court transcript of the proceedings before issuing their statements.

The State Government appointed Mr. Justice Dovey as a Royal Commissioner to investigate allegations by David Edward Studley-Ruxton.

Studley-Ruxton alleged that seven police officers assaulted him at Darlinghurst police station on February 25.

The Commission sat for 15 days, and Mr. Justice Dovey presented his report last Friday.

In it he exonerated all but two of the police.

He found that Studley-Ruxton received body injuries before his arrest, probably in a drunken brawl.

He reported that he was unable to determine how Studley-Ruxton received injuries to his face and arms.

But he said that he had more than a slight suspicion that Detective L. G. Birchall or Detective J. R. Hill may have hit Studley-Ruxton.

Both the Bar Council of New South Wales and the Council of the Incorporated Law Institute of New South Wales issued written statements to the Press after meetings which they held yesterday.

The Bar Council is the professional association of the barristers.

The Law Institute is the professional association of solicitors.

"Deeply concerned"

The statement by the Bar Council reads:

This Council is not concerned with the merits or demerits of the complaint of Mr. Studley-Ruxton or with the correctness or incorrectness of the Royal Commissioner's findings.

It is, however, deeply concerned with the maintenance of the dignity and prestige of the Bench, with the observance by Counsel of due standards of conduct, and with protection of the citizens who are called before the tribunals of the State.

In the opinion of this Council the Royal Commissioner in the conduct of the proceedings failed at times and in a signal degree to exhibit and exercise those qualities of dignity, tolerance, judicial calm and patience which this Council knows to be indispensable to the promotion and maintenance of the respect and confidence of the community and practitioners for and in the courts and other tribunals.

The Commissioner also at times failed to maintain that appearance of detachment and impartiality which is essential to the due administration of justice and to control Counsel, and himself exercise due restraint, so as not to subject witnesses appearing before him to unnecessary insult and prejudice.

This Council is also of opinion that certain of the

CONT. PAGE 2, COLS 5, 6.

'Complaints by many members'

CONT. FROM PAGE 1.

counsel appearing before the Royal Commission failed at times to observe proper restraint and a proper sense of fairness in questioning witnesses by asking questions which were unnecessarily insulting in form and in substance, and by making during the examination gratuitous and insulting comments upon answers given by witnesses.

This Council deplores these departures, and desires to dissociate itself and its members from such conduct.

This Council is further of opinion that Royal Commissions conducted in this manner not only do a great disservice to the prestige of the Bench and of the legal profession, but tend to defeat the essential purpose of such Commissions, namely, the production after a dispassionate and impartial judicial enquiry and review of the available facts and circumstances of a report which can safely be acted upon.

Having regard to the complaints made to members of this Council by so many members of the Bar, the Council feels that in these resolutions it is expressing views and feelings generally held throughout the Bar.

In the view of this Council it is apparent that amendments to the Royal Commissions Act are both necessary and desirable to give greater protection to persons called before Royal Commissions by, inter alia, giving to persons affected a right to be represented by counsel and by imposing upon the Royal Commissioner in emphatic form a duty to confine the enquiry to relevant matters, and to protect witnesses against unnecessary or insulting questions, and questions which relate to matters too remote in time or circumstance to have any real bearing upon the present credibility of the witness, and to prevent the invasion of the privilege of professional communications unless the nature and circumstances of the enquiry inexorably demand such a course.

The Bar Council decided to forward its resolution to the Attorney-General (Mr. Sheahan), the Chief Justice (the Hon. K. W. Street), and Mr. Justice Dovey.

The statement of the Council of the Incorporated Law Institute of New South Wales said:

After careful consideration the Council of the Incorporated Law Institute of New South Wales has resolved to issue for publication the following comments on the conduct of the Royal Commission relating to David Studley-Ruxton.

1. The Council deplores the departures from accepted standards of courtesy, fairness, and patience which took place during the proceedings, and it fears that the prestige and dignity of the Courts and of the Judiciary have thereby suffered greatly.

2. The Council regrets that the terms of the Commission were such as to make relevant to the enquiry consideration of interviews between solicitor and client, thereby disregarding the established legal principle that such communications are privileged.

3. The Council considers that the principle of professional privilege is of supreme importance to the administration of justice and the preservation of civil liberties and regrets that notwithstanding the terms of the Commission and of Section 17 of the Royal Commissions Act 1923, the Commissioner did not exercise his discretion to exclude evidence of communications between client, solicitor, and counsel.

4. The Council notes with grave concern that the Commissioner permitted and participated in cross-examination of a solicitor as to his actions and motives in assisting his client, and regards such a procedure as a most unfortunate and dangerous disregard of established principles.

5. The Council proposes, in order to resolve any doubts as to the effect of Section 17 of the Royal Commissions Act, to make representations for an amendment to protect a client's privilege.

[Section 17 of the Royal Commissions Act provides that a witness shall not be excused from answering questions on the ground that the answer may incriminate him or on the ground on privilege or on any other ground.

Privilege is the rule of law which protects various matters from disclosure to any court, including matters which pass between a solicitor and his client.]

EDITORIAL

A stand for justice

THE Bar Council of N.S.W. and the Council of the Incorporated Law Institute yesterday rebuked a judge.

He was Mr. Justice Dovey, who recently presided over the Studley-Ruxton Royal Commission.

The Daily Telegraph last Saturday pointed out that public disquiet at the handling of the Commission had been widespread, and criticism voiced by the people of this State had been uninhibited.

The public uneasiness was apparently well justified.

In their unprecedented action of criticising a judge of the Supreme Court, the Bar Council and the Law Institute bolstered the opinion of the man in the street.

And the man in the street will sigh with relief as he realises that these responsible professional bodies are determined that the standards of the judiciary will not be lowered, and that this "great disservice to the prestige of the Bench" will not be repeated.

The Courts are one of the mainstays of our democracy.

The Attorney-General (Mr. Sheahan) has frequently expressed his concern that the cherished institutions of justice should be maintained.

He will no doubt read the statements from the Bar Council and the council of the Law Institute with keen interest.

It is to be hoped that Mr. Justice Dovey —and "certain counsel" who also are castigated — give the statements the same attention.

Book Reviews

The Constitution of the Commonwealth of Australia Annotated (5th edition 1995)

R D Lumb and G A Moens

Butterworths, 1995
RRP $85.00

This is a fully revised edition of a work first published in 1976. Since its 4th edition in 1986, the High Court, under the leadership of Sir Anthony Mason, has delivered a series of significant constitutional decisions, all of which are penetratingly discussed in this edition, as indeed is a large number of decisions of the Federal and State Supreme Courts in which constitutional questions have arisen for determination. Amongst other things, the authors have successfully confronted the conundrum of how and where a work which explicitly takes the form of textual annotation deals with implied constitutional rights. Accordingly, included in the book is to be found an extensive discussion of decisions such as *Australian Capital Television Pty Ltd v Commonwealth* ([1992] 177 CLR 106) and *Nationwide Pty Ltd v Wills* ([1992] 177 CLR 1).

The book commences with a discursive introductory chapter which casts a glance at Australian constitutional history and evolving relations with the United Kingdom, including the significance of the Australia Acts. It also adverts to questions of federalism, the separation of powers and the role of the High Court and judicial review. The sections of the work which have been substantially revised since the last edition are those dealing with external affairs, acquisitions, industrial relations, corporations and sections 90 and 92. The treatment of section 92 is bifurcated - the landmark decision in *Cole v Whitfield* ([1988] 165 CLR 360) and the cases which have grappled with the meaning of "discrimination of a protectionist kind" following that decision are treated in the main body of the text; the pre-*Cole* jurisprudence forms a 25-page Appendix which is of more than passing historical interest (although the authors do not undertake the task of analysing which of the pre-1988 body of case law would be decided differently post-*Cole*).

This book is an excellent starting point for any constitutional inquiry. Each section of the Constitution is separately annotated and analysed. One particularly useful feature of the work is that it seeks to identify, although not exhaustively, the source of constitutional authority for a large number of Commonwealth enactments, thus providing a ready signpost to the authorities and arguments relevant to any challenge to an Act's constitutional validity. Page references are also provided to the treatment of each particular section of the Constitution in other leading constitutional texts, including *Quick and Garran*. In addition, interspersed throughout the work are references to various recommendations of the Australian Constitutional Convention, the Constitutional Commission and the Republic Advisory Committee. The work of these bodies is itself a useful source of reference and it is pleasing that recognition has been given to that fact. There is also to be found at the end of the book an extensive Bibliography.

Assuming that the practitioner or student knows where to start looking in the Constitution for the answer to his or her particular problem, this work can lay valid claim to being the required first port of call for any constitutional inquiry. It should not be thought, however, that to describe it as a useful starting point is to undervalue the quality of the substantive discussion which it contains. It is simply to emphasise the book's particular value as a resource and reference tool. ❑

Dr Andrew S Bell

Castles' Annotated Bibliography of Printed Materials on Australian Law 1788-1900

Professor Alex C Castles

The Law Book Company Limited, 1994
RRP $120.00

As the editor himself states, "[a] bibliography of printed materials on Australian law cannot be definitive". However, in this collection of materials, which is the product of a decade's work, there is an extremely comprehensive selection of the legislation, law reports, digests, treatises and pamphlets available to practitioners and lay persons alike in respect of the administration of justice in the Australian colonies in the period between settlement and Federation.

The scope of the collection is impressive, and at times extremely amusing. The entries range from the first proclamations, official orders and other directives to a document by the Rev. James Nish dauntingly entitled "Is Marriage with a Deceased Wife's Sister Forbidden in Scripture?" being the substance of a speech delivered before the General Assembly of the Presbyterian Church of Victoria, together with a "Review of Strictures on the Speech" (1873) (an issue on which Australia proved to be rather more progressive than Britain); and from the first series of law reports in each of the colonies to the blatantly self-aggrandising pamphlets of practitioners and law reformers. Notable in this latter category is the writing of one Thomas Parsons, a Melbourne barrister in the mid nineteenth century, who also rejoiced under the appellation for publication purposes of "Washerwoman", and who, had he lived in another age, from the volume of his correspondence to all and sundry, would surely be all too familiar to those responsible for twentieth-century letters to the editor columns.

The bibliography commences with an outline of legal publishing in Australia from the first written Ordinances and the first use of a printing press in 1796 by the convict George Hughes through to the sophisticated reporting of the Federation debates. The materials themselves are listed alphabetically with enlightening annotations regarding the availability, genesis and context of the documents.

This book, by one of Australia's leading legal historians,

is fittingly dedicated to Charles F Maxwell, "the founder of modern law publishing in Australia". One of this book's most engaging aspects, of which Maxwell would no doubt be proud, is the clear impression it conveys of the early vitality of indigenous Australian jurisprudence. ❑ Penny Wines

Equitable Damages

Peter M McDermott

Butterworths, 1994
RRP $70.00

One of the first impressions upon reading this book is the depth of the research that is reflected throughout the analysis it contains. As the Rt Hon. Sir Robert Megarry notes in the foreword to *Equitable Damages*, "[t]he author has ranged far and wide in his research for this book. It is remarkably comprehensive and thorough, both geographically and within the various jurisdictions." An indication of the scope of this work may be found in the Appendix which outlines the statutory provisions dealing with the jurisdiction to award equitable damages in England and Ireland, each of the Australian jurisdictions, New Zealand, eight Canadian jurisdictions and five Commonwealth jurisdictions. Each of these jurisdictions is dealt with in turn in chapters 12 to 15 of *Equitable Damages*.

The structure of the book is logical and approachable. It commences with an examination of the original jurisdiction of the Court of Chancery to award damages (see further below), considers reform prior to the *Judicature Acts* and then analyses the circumstances in which the remedy will be available. Chapter 10 is an extremely useful collection of and commentary on the cases dealing with the procedural aspects of seeking equitable damages. For example, at 10.8, McDermott deals with the suggestion that there must be a claim for equitable relief before jurisdiction under *Lord Cairn's Act* will exist: *Williamson v Friend* ([1901] 1 SR (NSW) Eq 23). Relying on more modern Canadian and Queensland authorities he concludes that such statements take an unduly narrow view of the jurisdiction.

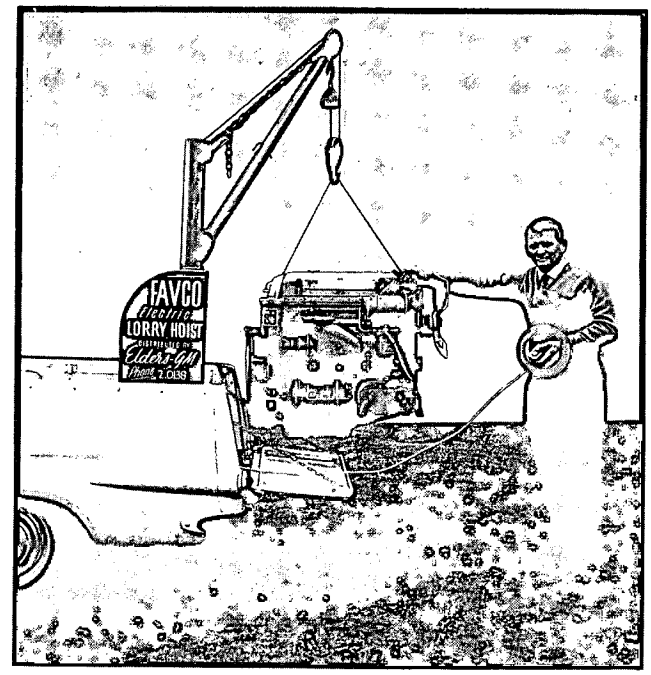
One of the most interesting aspects of *Equitable Damages* is that although McDermott acknowledges his indebtedness to other commentators, he does not fail to take issue with them when the occasion seems appropriate. One instance of this is the appropriate interpretation of the decision in *Hooker v Arthur* ([1671-1672] 2 Ch Rep 62; 21 ER 616) and, in particular, whether the case is authority for the proposition that "Chancery would not entertain an action for damages, in that case for breach of covenant in a lease, where this was the principal relief sought". R P Meagher, W M C Gummow and J R F Lehane, *Equity - Doctrines and Remedies*, 3rd ed., Butterworths, Sydney, 1992 [2305] (cf the decision of Lord Nottingham in *Cleaton v Gower* ([1674] Cas t F 164; 23 ER 90). On the basis that *Hooker v Arthur* arose in circumstances where the plaintiff had previously defended an action in law in which he claimed damages were improperly claimed and thus sought to invoke the jurisdiction of Chancery, McDermott compellingly argues that the case is more appropriately characterised as authority that the Court of Chancery would not act as an appellate tribunal to review an action at law (page 14). This is, as he points out, consistent with the then operating general principle that "a Cause shall not be examined upon Equity in the Court of Requests, Chancery, or other Court of Equity, after Judgment at the Common Law" (1 Eq Cas Abr 130; 21 ER 433).

In his Preface the author states that he considered the subject of equitable damages warranted discrete treatment in a book where the leading authorities are gathered for the convenience of practitioners. *Equitable Damages* establishes that this was clearly the case and is a treatment of the subject upon which many will no doubt come to rely. ❑

Penny Wines

Judicial Elevation

A former workmate of Mr Justice Ireland donated this advertisement to Bar News to show the Bar what his Honour was doing in the early 1960s. No doubt his Honour was checking the hoist to ensure it complied with the *Scaffolding and Lifts Act 1912 (NSW)*.



with FAVCO LORRY HOIST
a press of the thumb lifts up to 2,000 lbs.

(MODEL "A" LIFTS 1,000 LBS. MODEL "B" LIFTS 2,000 LBS.)

...a tough, safe, low-cost crane that is battery-powered and remote-controlled... Mounts detachably on your truck (takes less than one square foot) and makes the impossible possible.

Circuit Food I

Armidale

The Tamworth circuit was held in Armidale so that rebuilding of the ghastly thirties brick court house in Tamworth could proceed. Armidale Court House is an elegant Federation building with the coldest forecourt punters and witnesses have ever had to contend with, in my memory.

The party of the second part and I drove up the coast and stayed over in Port Macquarie before driving up through the spectacular ranges and rainforest of the Oxley Wild Rivers National Park, through Walcha and Uralla to Armidale. In Port we stayed at Sails Resort which is four-star and very swish. The pool was cold, but salt water and invigorating as well as fun.

We ate in a BYO fish restaurant called "Scampis" which let first class ingredients well cooked, down by some slap dashery at the edges. The seafood chowder was microwaved in the plate it was served in, cold in the middle and sticking to the plate at the edges. It was no better than ordinary. The oysters had been stored in a cold room or refrigerator and, although fresh tasting, were dead and had lost the lovely succulence that the Wallis Lakes ones usually have.

The bread was microwaved too and was spongy, warm and blah.

For one main we had delicious Tiger prawns fried in butter, lemon and garlic. These were fresh local produce and excellent. The other was grilled jewfish, two slabs of fresh and just-cooked flesh with just butter and lemon. This was the very best of the meal and worth going for on its own.

I would definitely go again, but I might be a bit picky. All the sauces, with the oysters and with the mains, were the bulk bottled sort and best left alone. Stay with the fresh and simple.

In Armidale itself one has to say that in general the food is better than Tamworth. Sabatina's "Italian Ristorante" in the old Bishopscourt function centre was a mixed bag. The tomato and basil soup was delicious but the brains, with a mustard sauce and a tartlet, didn't work. The sauce drowned out the flavour of the brains and the tartlet seemed an irrelevant afterthought. The pastas were all right but not special, and the mushrooms were cooked in butter with cheese on top and too fatty for my taste.

A real find was the Armidale Bowling Club. I asked the guy in the fruit market, who looked to me as if food and drink were matters of interest to him, where one would get the best steak in town. Without hesitation he nominated this club. The first time we went I made the mistake of ordering a large rump. It came on a metal sizzling platter, overhanging the ends and I guess a pound cooked if it was an ounce! As rare as requested and just a bit charred. This was delicious; just what I felt like on a cold, wet, wintry night. The vegetables are bain marie and only what the bulk supply permits. The service was cheerful and brisk - a Cassegrain Cabernet Shiraz 1989 and two beers came about 50 seconds after we sat down. Bread and salad off a salad bar and quite OK. Annette had the small steak, only about 10 ounces, and chips to share. We went back on a Sunday near to 7 pm and it fell apart. Peter O'Connor got a grey "rare" steak and made me write *"I won't recommend a club restaurant again"* 500 times.

The Cattleman's Motor Inn is the best place to stay, but the dining room is expensive and really only fair. A steak, much smaller than the Bowling Club's, cost $23.90 and there was little to enthuse over. Breakfast, however, is excellent, served in the garden restaurant with plenty of fresh fruit, cereals and "hearty" breakfasts as well. The devilled kidneys rate a special mention; fresh, tender, tangy and satisfying.

The best of it, we thought, was the Cotswold Gardens Restaurant. The room itself is special: in an elegant old home offering accommodation, guest lounge, bar and billiard room, the dining room occupies the front section with stained glass leadlight windows. It is spacious but welcoming, with redwood tables, simply laid with quality linen, cutlery and china and has a big enclosed fire as a centrepiece.

The chef is Kelly Cartlidge, a charming woman in her early twenties I guess, who is cooking with flair and precision. The only disappointment in four visits was a minestrone which just needed more cooking, a rest and reheating. The beans were tough!

The mussels in tomato and garlic were piping hot and delicious, the sauce had white wine, chopped garlic and tomato: the New Zealand blue-lipped mussels were cooked in it then ladled into earthenware pots, a dollop of cheese put on top and finished under the griller, then served in the pots with lids on. For me the cheese was de trop but this whole dish was lovely, and piping hot for an Armidale winter's night.

The other entrée was chargrilled kangaroo with vegetable ribbons and vinaigrette. The medallions of kangaroo steak were thinly sliced and cooked on a hotplate, very fast, in garlic butter. The vinaigrette (hot) was made with balsamic vinegar, olive oil, thyme, oregano, marjoram and mustard seeds. This tasty dish was served with ribbons of zucchini, capsicum and carrot and made a special entrée.

For main course, to follow the mussels, I had steak and kidney pie. Kelly does this with an old-fashioned touch and it is easily the Cotswold's most popular winter dish. She begins with "stewing" steak - skirt or round usually - quickly fried in bite-size pieces with chunks of ox kidney to brown and then bubbled very slowly in homemade stock for three to four hours with just onions, some red wine and a splash of worcestershire sauce. Close to serving she adds a few quick-fried lambs' kidneys and ladles into individual pie dishes, puts puff pastry on top and finishes in a hot oven.

The party of the second part had penne pasta with veal pieces (off a knuckle I thought), shallots and shaved parmesan for sauce. This was light enough and very tasty.

The quality was such that we returned twice and then asked Kelly to "do" the Tamworth Kidney Night for us. When we cook it for ourselves we get it exactly as we like it, but she did very well as the 22 circuiteers will attest.

On other visits we had a superb spicy fish soup, a sort of bouillabaisse with fresh chilli, and a barramundi with lime and ginger grilled with butter for moistening. Hot damper

and toasted focaccia and the superb Pike's Clare Valley Riesling all hit the spot, too!

After the "Kidney Night" main course we had suet pudding, steamed with golden syrup and crème anglais (custard to you), another old-fashioned country special and just glutinous and scrumptious. Cognac for bed. A bit of old England in New England, but with modern flair.

Scampis Marina Seafood Restaurant
Port Marina
Park Street
Port Macquarie
Tel: (065) 837 200
Hours: Dinner only 7 nights
Credit Cards: All major credit cards accepted, except Diners Club.

Sabitana's Italian Ristorante
(Opposite Negs in the) Highway
Armidale
Tel: (067) 71 1955
Hours: Dinner only Wednesday through Saturday from 6.00pm
Credit Cards: All major credit cards accepted, except Diners Club.

Armidale Bowling Club
Dumaresq Street
Armidale
Tel: (067) 72 5666

Cotswold Gardens Restaurant
34 Marsh Street
Armidale
Tel: (067) 72 8222
Hours: Dinner only 7 nights from 6.30pm
Lunch for group bookings only (minimum 5) by arrangement
Credit Cards: All major credit cards accepted.

❑ John Coombs QC

The Best of Byron Bay got the Ringmaster's Award for '95

I have praised the work done by cooks at Byron Bay for years. The Lismore circuit remains a favourite because of the beauty of the Bay and the consistent high standards. The Rocks is good all day, breakfast especially. The Beach Hotel does top class fast food! I like the two Indian places too, but the new star is the "Raving Prawn". Peter Crittle, Major Domo of New South Wales Rugby, gave us the tip, and although I have had some to equal it, I have never had a better seafood meal.

Pauline Kinsella is a sharer so she joined Annette and I in sampling three entrées. The first was small (not baby) octopus braised in red wine and served on a risotto. The braising had seared the legs somewhat and the juice and red wine had reduced to produce a delicious sticky sauce through the risotto. Seared calamari with chilli and Hoisin marinade on fine noodles came to Annette and the sweet but sharp flavour blended wonderfully with the first slightly burnt flavour of the calamari.

Next, spinach and ricotta gnocchi with a lemon butter and bacon sauce. These were also superb, gelatinous but light and flavoursome.

The mains continued the standard. A superbly fresh local and thick jewfish steak was cooked with herb, crumb and mustard crust under a very fast grill. New to me and just fabulous, tender sweet fish with a crispy top.

Annette chose the whole fresh local schnapper, plain grilled with a bed of jasmine rice and a chilli lime coriander and coconut sauce served separately.

We stayed with a range of Rhine Rieslings, Lindemans 4 figure bin number, Hunter and Margaret River because it had to be a "white" night.

This was a truly educational and memorable meal. We will return!

The Raving Prawn
Fernos Arcade
Jonson Street
Byron Bay

Tel: (066) 85 6737

❑ John Coombs QC

Circuit Food II - Oxfordshire

From September 1994 to February 1995, I was the Invitation Visiting Scholar for Medico-Legal Studies at Green College, Oxford, where he dined as well as he dines in Armidale and Byron Bay.

As you all know, I have always defined circuit broadly enough to encompass places on the way, on the way back, or out of the way altogether.

Bridging two terms at Oxford as the Green College Visiting Scholar seems as likely a circuit as many: Murray QC, Hickey, sister Janet and others have passed by, as have many Agent Orange colleagues.

English food is much maligned and quite unjustly. They do very good pub food, wonderful fish and chips, and no-one does game better.

Let me begin at "The Swan" at Swinbrook, 20 miles from Oxford just off the A40 going north towards Cheltenham and one and a half miles from where Annette and I lived in Burford, one of our 17 locals within walking distance. "Best steak and kidney pie in the Cotswolds" an Oxford octogenarian

confided. I haven't had it everywhere, of course, but it was truly superb. It came in an individual ceramic dish, about 7" x 5" x 3" full of juicy beef and lambs' kidneys (about one third) with onion and carrot in the gravy topped with a short buttery pastry crisp and moist. Vegies à la dente, sprouts, baby spuds and beans.

Other specialties which enhance this lovely snug old pub, with a river through it (it's an old Mill building) and swans, geese, tern and coot everywhere, are the Rabbit Forrestiere, rich and gamey, circular Cumberland sausage, pheasant casserole (finger-licking good!).

Other great locals are "The Angel" in Burford (Mussels Mariniere and Braised Rabbit in Cider and Dijon Mustard), "The Royal Oak" (Celery and Stilton Soup), "The Mermaid" (a Yorkshire pudding "basin" with roast beef and gravy filling), and "The Royal William" at the crossroads near Stroud at the Painswick turn-off where the best suet pudding stuffed wth a beef and mushroom stew is served every day. I had forgotten how luscious steamed suet puddings are!

But the meal of the month came by accident. Most of us still go to England some time and to Stratford when we do. A play there beckoned and, after it, I chose a restaurant called "The Lamb", by reference only to its blackboard menu. It has been in its present hands only five months, so it hasn't hit the "places to eat" books yet, but, believe me, it will.

We had had soup before the play so wanted only two mains to share. I chose Lamb Shank with Parsley Mash and Annette chose Guinea Fowl Casserole with Creamed Savoy Cabbage. As we sipped Theakstone Bitter, Julie brought tomato and plain Chiabata - "we make our own" she said casually. This bread should have alerted us: fresh, crunchy, full of flavour and with those holes in it that say it's been made by a person!

In about 20 minutes the two meals were brought proudly to the table. No other word will do - the place exudes commitment to excellence.

The shank was huge: the bottom third of the back leg of a baby lamb. The outside was crisp and it was soft and juicy all through and not quite falling off the bone. It was in a pool of fabulous full-flavoured stock - wine herb and garlic sauce. With it came a cone of parsley flavoured, olive oily mashed potatoes. The presentation was superb - the sauce glazed and with a sheen, thick and meaty red brown, the shank rampant and the cone of mash, green glossy erect beside it. This was a meal in a million, truly.

Was the guinea fowl a disappointment after this climax? By no means. Another piece of culinary artistry producing a gutsy meal hit the table at the same time. The sauce (of stock from the fowl carcass baked with carrots, leeks, celery, garlic and onion and slow-cooked for 12 hours!) had smoked back bacon, three sorts of wild mushrooms, shallots and thyme, marjoram and rosemary. In this the leg and thigh portions of the bird are slowly cooked, then removed and the sauce reduced after red and white wine and port are added. Again, superb presentation. The drumstick comes upright, the thigh and leg in the sauce beside the breast (quickly sealed and roasted after your order is taken) and Cabbage Savoy à la dente with smoked bacon sweated in clarified butter next to that. Four pickling onions cooked in their skins in a very hot oven after a spray of olive oil then "popped", decorate the plate, glistening. Did I say they do game well? The best game meal I have ever had half of.

I went to talk to the owner/cook and the owner/maître d'manageress, Paul and Julie Desport, next morning. The shanks cook, after fast browning, for six hours, four before the stock boils and then simmer. A bottle of red and half a bottle of Ruby port go into the stock after it has absorbed shallots, herbs, a knob of garlic and just before the lamb shanks (20 in a huge pot!).

It is strained and reduced by half after the shanks are done.

This is patient, masterly cooking and it works superbly. Go there and tell them I sent you. I love them and they deserve the success they will get.

Lambs on Sheep Street
Stratford-on-Avon
(089) 29 2554

❑ John Coombs QC

Such Patience!

Peter Garling QC:	Yes, I just want to get some terms right. As you know, I'm a slow moving barrister.
Witness (Dr Eric Fisher):	That's difficult to believe.
Mr Garling:	Sorry?
Witness:	That's difficult to believe.
Mr Worthington:	Which part?
His Honour:	Mr Garling, you do not have to respond to either of those insulting comments from your colleagues.
Mr Garling:	I will just keep going on. I am indebted to them.

(*Lipovac v H A Milton Holding Pty Ltd & Ors* [Cor. Higgins J, ACT Supreme Court]). ❑

Freudian Slip

A slip of the pen occurred in transcribing the Solicitor General's submissions in the proceedings before Hunt CJ at CL over Mr Milat's legal representation. The case involved an application for a stay because the rates offered by the Legal Aid Commission to Mr Milat's lawyers were said to be inadequate. The transcript records (p222) the Solicitor General submitting:

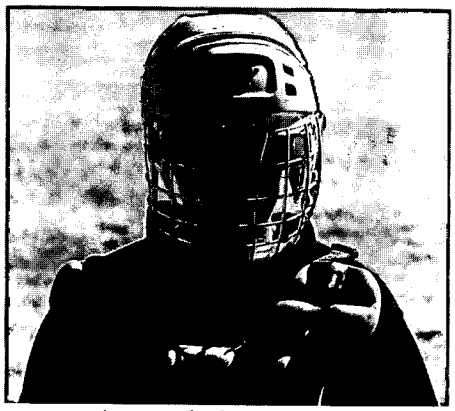
What this case is all about, no matter how many lawyers [sic] you peel away ..." ❑

This Sporting Life

Bar v Solicitors Hockey

On Sunday 20 August, a very hot and very dry day did not deter Leigh Stone as Manager from the task of getting the Bar team onto the field at Queen Elizabeth Reserve, West Lindfield to defend the coveted Noonan Trophy in the annual contest with the Solicitors. Despite his efforts, the match started badly for us as not only did a young, fit and clever Solicitors' forward line take the offensive early and score a goal, but Ireland QC suffered a nasty ankle injury and had to be assisted from the field. Fortunately, George Giagios turned up and he took over at fullback and thereafter performed very well indeed.

Ian Harvey, an old forward, played out of position at centre half, but had an outstanding game. David Jordan stood out at right half showing fitness and a turn of speed not demonstrated by the rest of the Bar side. Philip Durack made the most of the limited opportunities given to him at centre forward and played skilfully. David Pritchard was also prominent in the forward line. Priscilla Adey and Bruce McManamey, each participating for the first time in one of these matches, contributed well. Despite the efforts of these and others, the Solicitors led at half time 2-0.



A muzzled Katzmann!

Masterman QC came on in the second half but even his enthusiastic and vigorous play was not sufficient to hold back the regular attacks on our goal where Anna Katzmann turned in another display of courage and competence. The Solicitors scored two more goals but Durack managed to net one for us. The game was umpired by the well qualified Eric Ralphs and Stan Cleaver from Sydney Hockey Umpires' Association and they kept it under control and in the right spirit, apart from giving Callaghan SC a temporary suspension for allegedly foul play - a questionable call!

Old hockey stalwarts Gyles QC and Gordon Johnson turned up to support the Bar and Johnson presented the trophy to the Solicitors' Captain so that, after several years, it will be out of the Bar's possession for the next 12 months. Much drinking, eating, recounting of past glories and other socialising went on until the early evening. The Bar complement on the field was Priscilla Adey, Bellanto QC, Callaghan SC (Captain), Lyn Cooper (non-practising), Philip Durack, George Giagios, Ian Harvey, Ireland QC, David Jordan, Anna Katzmann, Patrick Larkin, Bruce McManamey, Masterman QC, David Pritchard, and David Robertson. ❑

The Bar side await their opponents.

Sir Owen Dixon XI v The Kookaburras

Although this match took place early this year, it is worth recording the sorties of a chambers-based sports team.

On Sunday 5 February 1995 the pride of Sir Owen Dixon Chambers, namely their First XI, played what is hoped to be the inaugural clash with the Goulburn-based, barrister-eating Kookaburras. The Kookaburras are a team mainly composed of local gentry and Goulburn squattocracy. The match was played on a private property northwest of Goulburn.

The evening prior to the match involved a dinner at the Goulburn Club where Jack Pollard, famous and prodigious author of sporting works, was the guest of honour and spoke to the gathering after dinner. Jack then fielded questions with considerably greater skill than was demonstrated the following day.

Owen Dixon, led by right-arm, leg-spinning Captain Terracini, won the toss and elected to bat on a wicket that could best be described as non-conducive under scudding rain clouds. During breaks in the drought relief, Owen Dixon got off to a healthy start reaching 0-49. This was followed by a "procession" to and from the dressing sheds with the addition of 116 runs leaving a total of 165 to defend. Top score with 49 runs was Chambers junior Shane McNee. The pick of the bowling was J Tozer taking 4 wickets and narrowly missing a hat-trick, something never before experienced by the Owen Dixon XI. Thos Hodgson of Edmund Barton Chambers joined our team for the day and supplied important gear.

A marvellous lunch was laid on by the Kookaburras who were catering for some 30-35 people all-told. In a nearby paddock 85 sheep looked on enviously.

The defence struck immediate problems after the resumption. The Kookaburras raced to 0-80 before D Tozer retired on 50. As prayers for rain went unanswered the Kookaburras continued the onslaught to reach 103 before Terracini brought himself into the attack. Notwithstanding a saturated synthetic wicket and a waterlogged ball (courtesy of a magnificent 6 over long-on into a distant creek off David "but it was on middle stump" Farthing) Terracini took 2 for 8 and also had several chances dropped. John O'Sullivan took a magnificent catch at long-on despite the ball gathering ice during its lengthy ascent and descent.

The Kookaburras reached the target of 30 overs for the loss of 4 wickets. Jack Pollard, who graciously agreed to become Owen Dixon patron, had stayed to watch most of the match and was also on hand to autograph several of his works. Fortunately Jack could not stay until the end so perhaps left with fond memories of his team's performance to that point. All agree, however, that with a few more runs and improved catching, the result could have been a close-run thing, and with that in mind, the Kookaburras have suggested an annual fixture. No other team has been bestowed that honour. Oh, what a joy beating barristers!

After the match there was the presentation:

Best Bowler:	Terracini
Best Batsman:	D Tozer (Kookaburras)
Best Fielder:	O'Sullivan

A few light ales, the photo, and we were away with extremely fond memories of a great day's cricket. ❑

W C Terracini and P W G Stitz
Sir Owen Dixon Chambers

(L to R front row) Winston Terracini, Thos. Hodgson, Angus Gibson, P Stitz, Guy Yuill, Phil Collins. (L to R 2nd row) D Tozer, "The Moth" Williams, Ian Cheetham, Skinny Adams, P. Beale, Andrew "Slasher" Mackay, Lewis Tyndall, Tozer Junior. (L to R back row) Colin McDonald, Lindsay Cline, Steve Lamond, David Farthing, John O'Sullivan, Shane McKnee, Philip Bates, "Bullet" Green, Jack Dempsey, Deputy Chief Magistrate of New South Wales G. Henson.